

United States
Circuit Court of Appeals
For the Ninth Circuit.

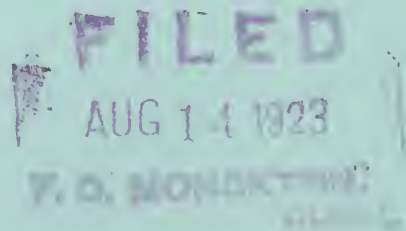
OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation,
Now Known as ALLEN MURPHY
COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Oregon.



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OWEN M. BRUNER COMPANY, a Corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of the Attorneys of Record.

PLATT & PLATT, MONTGOMERY & FALES,
Platt Building, Portland, Oregon, for the
Plaintiff in Error.

NASH, GRAHAM & MARSCH, Yeon Building,
Portland, Oregon, for the Defendant in Error.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant in Error.

Citation on Writ of Error.

United States of America,

District of Oregon,—ss.

To O. R. Menefee Lumber Co., a corporation,
known as Allen Murphy Co., a corporation.

GREETING:

You are hereby cited and admonished to be and
appear before the United States Circuit Court of
Appeals for the Ninth Circuit at San Francisco,
California within thirty days from the date hereof
pursuant to a writ of error filed in the clerk's of-

fice of the District Court of the United States for the District of Oregon, wherein Owen M. Bruner Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said District this 2d day of June, 1923.

CHAS. E. WOLVERTON,

Judge. [1*]

United States of America,
District of Oregon,—ss.

Service of the within citation on writ of error, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 2d day of June, 1923.

S. J. GRAHAM,

Of Attys. for Defendant. [2]

[Endorsed]: No. L-8874. United States Circuit Court of Appeals for the Ninth Circuit. Owen M. Bruner Company, Plaintiff, vs. O. R. Menefee Lumber Co., Defendant. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Jun. 2, 1923. By G. H. Marsh, Clerk.

*Page-number appearing at foot of page of original certified Transcript of Record.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America.
to the Judge of the District Court of the
United States for the District of Oregon,
GREETING:

Because in the record and proceedings, as also
in the rendition of the judgment, of a plea which
is in the said District Court, before you, or some
of you, between Owen M. Bruner Company, a cor-
poration, plaintiff, and plaintiff in error, and O.
R. Menefee Lumber Co., a corporation, now known
as Allen Murphy Co., a corporation, defendant, and
defendant in error, a manifest error has happened to
the great damage of the said Owen M. Bruner Com-
pany, a corporation, plaintiff, and the plaintiff in
error, as by its complaint appears, we being will-
ing that error, if any there has been, should be
duly corrected, and full and speedy justice be done

to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the [3] same at San Francisco, California, within thirty days from this date, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 2d day of June, 1923, and in the one hundred forty-seventh year of the Independence of the United States of America.

[Seal]

G. H. MARSH,

Clerk of the United States District Court, District of Oregon.

By F. L. Buck,
Chief Deputy.

Allowed: CHAS. E. WOLVERTON,
United States District Judge.

Service of the foregoing writ of error made this 2d day of June, 1923, upon the District Court of the United States for the District of Oregon, by

filing with me as Clerk of said Court, a duly certified copy of said writ of error.

G. H. MARSH,
Clerk of the United States District Court, District
of Oregon.

By F. L. Buck,
Chief Deputy.
CHAS. E. WOLVERTON,
Judge. [4]

United States of America,
District of Oregon,—ss.

Service of the within writ of error, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 2d day of June, 1923.

S. J. GRAHAM,
Of Attys. for Defendant. [5]

[Endorsed]: No. L-8874. United States Circuit Court of Appeals for the Ninth Circuit. Owen M. Bruner Company, Plaintiff, vs. O. R. Menefee Lumber Co., Defendant. Writ of Error. Filed June 2d, 1923. G. H. Marsh, Clerk, United States District Court, District of Oregon. By F. L. Buck, Chief Deputy.

In the District Court of the United States for the
District of Oregon.

November Term, 1921.

BE IT REMEMBERED that on the 6th day of December, 1921, there was duly filed in the District Court of the United States for the District of Ore-

gon, a complaint, in words and figures as follows,
to wit: [6]

In the District Court of the United States for the
District of Oregon.

(AT LAW.)

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Complaint.

Comes now the above-named plaintiff, and for
cause of action against the above-named defendant,
complains and alleges:

I.

That at all times and dates herein mentioned, the
plaintiff, Owen M. Bruner Company, was and now
is a corporation duly incorporated under and by
virtue of the laws of the State of New Jersey, with
its principal place of business in the city of Phila-
delphia in the State of Pennsylvania.

II.

That at all times and dates herein mentioned,
the defendant, O. R. Menefee Lumber Company,
was and now is a corporation duly incorporated
under and by virtue of the laws of the State of
Oregon, with its principal place of business in the

city of Portland, Multnomah County, Oregon, and that the said O. R. Menefee Lumber Company the defendant herein has caused its name to be changed to that of the Allen-Murphy Lumber Co. by filing under date of June 4, 1920, Supplementary Articles of Incorporation with the Corporation Commissioner of the State of Oregon; and the said defendant is now known by the name of Allen-Murphy Lumber Company, and is a corporation, duly existing under the laws of the State of Oregon.

[7]

III.

That the grounds upon which the Court's jurisdiction depends in this case are the diversity of citizenship existing between plaintiff and defendant herein, and the amount involved in this cause being above the sum of \$3,000.00.

IV.

That on or about the 21st day of November, 1919, plaintiff and defendant entered into an agreement wherein and whereby the defendant agreed to sell to plaintiff and the plaintiff agreed to buy from the defendant 25 car loads of Douglas Fir Lumber at the agreed and stipulated price of \$48.50 per thousand feet F. O. B. New York or points within the New York territory taking the New York freight rate of 80 cents, or at the agreed and stipulated price of \$48.00 per thousand feet F. O. B. Philadelphia or points within the Philadelphia territory taking the 78 cents freight rate; that thereafter or on or about the 25th day of November, 1919,

said agreement was confirmed by a signed and accepted order which read as follows:

Send all invoices with Bill of Lading to this Office.

Owen M. Bruner Company
Wholesale Lumber

Order No. 11385.

Please enter the above number on your invoice.
Southard's Code Used.

Philadelphia, Pa., November 25, 1919.

To W. C. Ashenfelter, Builders' Exchange, Philadelphia, Pa.

Please Ship from Owen M. Bruner Company to Owen M. Bruner Company at Shipping instructions to be supplied.

Enter in Bill Lading

Rate not to exceed
Route via

#1 COMMON DOUGLAS FIR—ROUGH

25 Cars 2x4 to 12x12 (with some larger sizes)—
12 to 40 ft. long.

Price delivered on a New York or 80

cent rate \$48.50

Price delivered on a 78 cent rate of

freight \$48.00

[8]

To be shipped in sizes and lengths as wanted. We shall immediately begin a campaign for orders and will send same to you as soon as we book the business.

This order covers order given you over 'phone on

November 21st., and bears correction as per your letter of the 22nd inst.

Prices F. O. B. cars. As above.

Commission. Cash Discount 2%

When to ship. As wanted.

Please acknowledge receipt of this order by return mail.

OMB:O

Yours truly,

OWEN M. BRUNER CO.,

W. C. ASHENFELTER,

Agt. for O. R. Menefee Co.

Do not Stencil Your Name or Advertisement on Car.

V.

That relying on the above mentioned agreement, the plaintiff herein at great costs and expenses, advertised and offered for sale to its clients the stock of lumber above mentioned.

VI.

That thereafter and on the 13th and 29th days of December, 1919, the plaintiff herein acting in compliance of the terms of the aforesaid agreement, gave shipping instructions to the defendant for delivery of two carloads of the said Douglas Fir Lumber of approximately 28,000 feet each.

VII.

That the defendant on the 19th day of December, 1919, advised the plaintiff that it had cancelled the order for 25 cars of lumber and that it would not ship said car asked for by plaintiff under date of December 13, 1919, nor any other part of said lumber so ordered under plaintiffs and defendants agreement as alleged in Paragraph IV herein. [9]

VIII.

That thereafter plaintiff made numerous demands upon said defendant that defendant live up to its agreement and ship said cars of lumber but defendant failed, neglected and refused to do so.

IX.

That the average car of Douglas fir rough lumber consists of 25,000 feet and therefore the amount of lumber covered by above agreement totals 625,000 feet.

X.

That at the time defendant refused to continue with the above-mentioned agreement the market price of #1 Common Douglas fir rough lumber was \$64.35 per thousand feet F. O. B. Philadelphia or points within the Philadelphia territory taking the 78 cents freight rate and was \$64.85 per thousand feet F. O. B. New York or points within the New York territory taking the New York freight rate of 80 cents or \$16.35 per thousand more than the price agreed on in the agreement mentioned in paragraph IV herein.

XI.

That by reason of defendant's failure, neglect and refusal to follow out the terms of the above-mentioned agreement plaintiff has been damaged to the extent of \$10,218.75.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of \$10,218.75 and for its costs and disbursements incurred herein.

SAMUEL B. LAWRENCE,

Attorney for Plaintiff.

State of Pennsylvania,
County of Philadelphia,—ss.

I, Owen M. Bruner, being first sworn, depose and [10] say that I am the president of Owen M. Bruner Company, plaintiff, in the above-entitled action; and that the foregoing complaint is true as I verily believe.

OWEN M. BRUNER,

Subscribed and sworn to before me this first day of December, 1921.

[Notarial Seal] FRANCIS R. MATLOCK,
Notary Public for the State of Pennsylvania.
Commission expires Jany. 22, 1925.

Filed December 6, 1921. G. H. Marsh, Clerk.
[11]

AND AFTERWARDS, to wit, on the 6th day of December, 1921, there was issued out of said court, a summons, which with the return of service thereon is in words and figures, as follows, to wit: [12]

Return on Service of Writ.

United States of America,
District of Oregon,—ss.

I hereby certify and return^{ed} that I served the annexed summons and copy of complaint on the therein named O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, by handing to and leaving a true and

correct copy thereof with Percy Allen, President of Allen Murphy Co., a corporation, personally at Portland, Oregon, in said District on the 6th day of December, A. D. 1921.

CLARENCE R. HOTCHKISS,

U. S. Marshal.

By Lee Morelock,

Deputy. [13]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Summons.

The President of the United States, to O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, the above-named defendant, GREETING:

You are hereby commanded to be and appear in the above-entitled Court, holden at the city of Portland, in said district, and answer the complaint filed against you in the above-entitled action, within ten days from the date of the service of this summons upon you, if served within the

county of Multnomah, in said district, or if served within any other county of said district, then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for \$10,218.75 and its costs and disbursements incurred herein.

And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

WITNESS the Honorable CHARLES E. WOLVERTON and the Honorable ROBERT S. BEAN, Judges of said court, and the seal thereof affixed at Portland, in said district, this 6th day of December, 1921.

[Seal]

G. H. MARSH,
Clerk.

By F. L. Buck,
Deputy Clerk.

Returned and Filed Dec. 6, 1921. G. H. Marsh,
Clerk. [14]

AND AFTERWARDS, to wit, on the 29th day of December, 1921, there was duly filed in said court an answer, in words and figures as follows, to wit: [15]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO.,
a Corporation,

Defendant.

Answer.

Comes now the defendant above named and for
answer to plaintiff's complaint, admits, denies and
alleges:

I.

Admits Paragraphs I and II of said complaint.

II.

Denies Paragraphs III, IV, V and VI of said
complaint and the whole thereof.

III.

Answering Paragraph VII of plaintiff's com-
plaint this defendant denies each and every alle-
gation therein contained and the whole thereof, ex-
cept that this defendant says that on December 2,
1919, immediately upon the receipt by it of the
alleged order it notified one W. C. Ashenfelter
that said alleged order could not and would not be
accepted as given, and that the only way it could
handle said order was as an order for random
widths and lengths; that in answer to said letter

of December 2d, said Ashenfelter advised this defendant that the plaintiff could not place said order for random widths and lengths; that thereupon and under date of December 18th this defendant wired said Ashenfelter refusing said order and in the same mail returned said order, and as this defendant is informed and believes, and therefore says, said Ashenfelter communicated all of said letters and wires to this plaintiff. [16]

IV.

Denied Paragraphs VIII, IX, X and XI of said complaint and the whole thereof.

And for a further and separate answer and defense to plaintiff's complaint this defendant alleges:

I.

That at all times and dates herein mentioned the plaintiff, Owen M. Bruner Company, was and now is a corporation duly incorporated under and by virtue of the laws of the State of New Jersey, with its principal place of business in the city of Philadelphia in the State of Pennsylvania.

II.

That at all times and dates herein mentioned the defendant, O. R. Menefee Lumber Company was, and now is a corporation duly incorporated under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland, Multnomah County, Oregon, and that the said O. R. Menefee Lumber Company, the defendant herein, has caused its name to be changed to that of the Allen-Murphy Lumber Co. by filing un-

der date of June 4, 1920, Supplementary Articles of Incorporation with the Corporation Commissioner of the State of Oregon; and the said defendant is now known by the name of Allen-Murphy Lumber Company, and is a corporation duly existing under the laws of the State of Oregon.

III.

That at all the times herein mentioned one W. C. Ashenfelter was a resident of Philadelphia, in the State of Pennsylvania, and represented this defendant as a lumber broker and not otherwise; that on or about the 14th day of November, 1919, the [17] defendant received an inquiry from the said Ashenfelter for prices on several cars 2"x4" to 12"x12" and 12' to 40' long No. 1 common Douglas fir rough, to be shipped to the order of the plaintiff herein; that said inquiry was for prices upon lumber to be shipped in any of the sizes or lengths therein specified at the option of the defendant; that thereupon this defendant telegraphed prices on said material as requested; that thereafter and on or about the 2d day of December, 1919, the defendant received from the plaintiff a writing which purported to be an order for 25 cars 2"x4" to 12"x12" (with some larger sizes) 12' to 40' long at the prices this defendant had quoted to said Ashenfelter; that said purported order provided that said material should be shipped in sizes and lengths as wanted by the plaintiff and should be shipped when wanted by this plaintiff; that immediately upon the receipt of said purported order this defendant notified said Ashenfelter that said

order was not in accordance with the inquiry of said Ashenfelter nor with the quotation made by this defendant to said Ashenfelter on said material, but that contrary to said inquiry and said quotation said order provided for the shipment of said material in sizes and lengths as wanted by said plaintiff instead of in random widths and lengths as provided for by said inquiry and said offer, and that this defendant could not accept said order as received by this defendant from the plaintiff but could only handle the same in random widths and lengths as provided by said inquiry and quotation; that thereafter and on or about the 18th day of December, 1919, this defendant received from the plaintiff instructions to ship approximately 28,000 feet No. 1 common Douglas fir rough, to be applied upon said alleged order hereinabove referred to; that said order specified the number of pieces of each size to be shipped and likewise specified the lengths thereof; that none of the material so [18] requested to be shipped pursuant to said order was less than twenty feet in length nor more than thirty-six feet in length; that said request to ship was not in accordance with the inquiry received by this defendant from said Ashenfelter and the quotation made by this defendant to said Ashenfelter as above set forth; that upon the said 18th day of December, 1919, this defendant notified said Ashenfelter that said order would not be accepted by this defendant and on said date this defendant returned said order to said Ashenfelter for the reasons above set forth.

IV.

That this defendant is informed and believes and therefore says that said Ashenfelter communicated all of said correspondence between him and this defendant with reference to said order to the plaintiff who had full notice and knowledge thereof, and this defendant further says on information and belief that said Ashenfelter in said transaction without the knowledge, consent or acquiescence of this defendant was the agent of and represented said plaintiff.

And for a second further and separate answer and defense and by way of counterclaim this defendant alleges:

I.

That at all times and dates herein mentioned the plaintiff, Owen M. Bruner Company, was and now is a corporation duly incorporated under and by virtue of the laws of the State of New Jersey, with its principal place of business in the city of Philadelphia in the State of Pennsylvania.

II.

That at all times and dates herein mentioned the defendant, O. R. Menefee Lumber Company, was and now is a corporation [19] duly incorporated under and by virtue of the laws of the State of Oregon, with its principal place of business in the city of Portland, Multnomah County, Oregon, and that the said O. R. Menefee Lumber Company, the defendant herein, has caused its name to be changed to that of the Allen-Murphy Lumber Co. by filing under date of June 4, 1920, Supplementary

Articles of Incorporation with the Corporation Commissioner of the State of Oregon; and the said defendant is now known by the name of Allen-Murphy Lumber Company, and is a corporation duly existing under the laws of the State of Oregon.

III.

That on or about the 31st day of January, 1921, the plaintiff was indebted to the defendant in the sum of \$551.32; that on said date an account was stated between said plaintiff and defendant on which there was found to be due to the defendant from the plaintiff the sum of \$551.32, which sum the plaintiff promised and agreed to pay to this defendant.

IV.

That payment of said sum has been demanded from the plaintiff by this defendant, but no part thereof has been paid; that there is now due from the plaintiff to the defendant on said account stated the sum of \$551.32, with interest thereon at the legal rate from the 31st day of January, 1921, until paid.

WHEREFORE, this defendant having fully answered plaintiff's complaint prays that it may be dismissed with costs, and that it may have and recover judgment against the plaintiff for the sum of \$551.32 with interest thereon at the legal rate from January 31, 1921, until paid, and for its costs and disbursements incurred herein.

NASH, GRAHAM and MARSCH,

Attorneys for Defendant. [20]

State of Oregon,
County of Multnomah,—ss.

I, Percy Allen, being first duly sworn, depose and say that I am the president of Allen Murphy Co., a corporation, defendant in the above-entitled action; and that the foregoing answer is true as I verily believe.

PERCY ALLEN.

Subscribed and sworn to before me this 29th day of December, 1921.

[Notarial Seal]

H. F. FORSBERG,

Notary Public for the State of Oregon.

My commission expires June 30, 1925.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 29th day of December, 1921, by receiving a copy thereof, duly certified to as such by Wm. S. Nash, one of the attorneys for defendant.

SAMUEL B. LAWRENCE,

Attorney for Plaintiff.

Filed December 29, 1921. G. H. Marsh, Clerk.
[21]

AND AFTERWARDS, to wit, on the 5th day of January, 1922, there was duly filed in said court, a reply in words and figures as follows, to wit: [22]

In the District Court of the United States for the
District of Oregon.

No. L-8874—(AT LAW).

OWEN M. BRUNER COMPANY, a Corporation.
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,
Defendant.

Reply.

Comes now the plaintiff and for reply to the
answer and defense of the defendant, admits, de-
nies and alleges as follows:

I.

Plaintiff admits paragraph I of defendant's an-
swer.

II.

Denies each and every allegation contained in
defendant's answer except wherein the same ex-
pressly admits the allegations of plaintiff's com-
plaint.

III.

Plaintiff admits paragraphs I and II of the
first separate answer and defense of defendant's
answer but denies each and every allegation con-
tained in defendant's further and separate an-
swer except wherein the same expressly admits
the allegations of the plaintiff's complaint.

IV.

The plaintiff admits paragraphs I and II of the defendant's second and further separate answer and defense and counterclaim but denies paragraphs III and IV thereof.

WHEREFORE, plaintiff demands judgment against the defendant as prayed for in plaintiff's complaint filed herein.

SAMUEL B. LAWRENCE,
Attorney for Plaintiff. [23]

State of Oregon,
County of Multnomah,—ss.

I, Samuel B. Lawrence, being first duly sworn, depose and say that I am the attorney of record for the plaintiff in this cause; that I am acquainted with the facts in this cause, and that the plaintiff is without the State of Oregon, and for these reasons make this reply in the above-entitled action; and that the foregoing reply is true as I verily believe.

SAMUEL B. LAWRENCE.

Subscribed and sworn to before me this 4th day of January, 1922.

[Notarial Seal] M. J. LAIDLAW,
Notary Public for the State of Oregon.
My commission expires Feb. 20, 1924.

State of Oregon,
County of Multnomah,—ss.

Due service of the copy of the within, admitted
at Portland, Oregon, this 5th day of January, 1922.

S. J. GRAHAM,
Of Attorneys for Defendant.

Filed January 5, 1922. G. H. Marsh, Clerk.
[24]

AND AFTERWARDS, to wit, on the 16th day of
November, 1922, there was duly filed in said
court, a stipulation waiving trial by jury in
words and figures as follows, to wit: [25]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE CO., a Corporation, Now Known
as ALLEN MURPHY LUMBER CO., a
Corporation,

Defendant.

Stipulation Waiving Jury.

IT IS HEREBY STIPULATED, by and be-
tween the plaintiff above named, by its attorneys
Samuel B. Lawrence and John M. Boyle, and the

defendant above named, by its attorneys Messrs. Nash, Graham & Marsch, that the parties to this suit do hereby waive a jury, and ask that the same be tried by the Court.

Dated this 16th day of November, 1922.

SAMUEL B. LAWRENCE,

JOHN M. BOYLE,

Attorneys for Plaintiff.

L. J. GRAHAM,

Of Attorneys for Defendant.

Filed November 16, 1922. G. H. Marsh, Clerk.

[26]

AND AFTERWARDS, to wit, on the 16th day of November, 1922, there was duly filed in said court, a stipulation to amend pleadings in words and figures as follows, to wit: [27]

In the District Court of the United States for the District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE CO., a Corporation, Now Known
as ALLEN MURPHY LUMBER CO., a
Corporation,

Defendant.

Stipulation to Amend Pleadings.

IT IS HEREBY STIPULATED by and between the plaintiff, by its respective attorneys John M. Boyle and Samuel B. Lawrence, and the defendant, by its attorneys Messrs. Nash, Graham & Marsch, that the complaint, answer, and any other pleadings in this cause be hereby amended, shall be and the same is hereby amended in the following respect:

That wherever reference is made to the Allen Murphy Co., a corporation, the same be changed to read Allen Murphy Lumber Co., a corporation, and wherever reference is made to the O. R. Menefee Lumber Co., a corporation, the same be changed to read O. R. Menefee Co., a corporation.

Dated this 26th day of October, 1922.

SAMUEL B. LAWRENCE and

JOHN M. BOYLE,

Of Attorneys for Plaintiff.

NASH, GRAHAM & MARSCH,

Attorneys for Defendant.

Filed November 16, 1922. G. H. Marsh, Clerk.
[28]

AND AFTERWARDS, to wit, on the 4th day of December, 1922, there was duly filed in said court, findings of fact and conclusions of law in words and figures as follows, to wit: [29]

In the District Court of the United States for the
District of Oregon.

No. L-8874—(AT LAW).

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. W. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Findings of Fact and Conclusions of Law.

This action came regularly on for trial before the Honorable Robert S. Bean, one of the Judges of the above-entitled court, on the 16th day of November, 1922. The plaintiff was represented by Mr. Samuel B. Lawrence and Messrs. Boyle & Boyle and the defendant by Messrs. Wm. S. Nash and S. J. Graham. The parties duly filed, through their respective attorneys of record, a stipulation in writing waiving a jury trial and consenting that the action be tried by the Court without a jury. The Court having heard the testimony of the respective parties and the arguments of counsel and now at this time being fully advised in the premises finds the following facts:

I.

That the parties hereto are corporations.

II.

That the plaintiff has failed to sustain the aver-

ments of its complaint, and in particular has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff's complaint.

III.

That the alleged order is unilateral and wanting in mutuality.

IV.

That the parties hereto, through their respective [30] counsel, stipulated in open court that the counterclaim set up in defendant's answer was a valid and subsisting claim against the plaintiff in the amount in said answer and counterclaim stated.

As conclusions of law the Court finds from the foregoing facts that the defendant is entitled to a judgment dismissing plaintiff's complaint with costs, and for a judgment against the plaintiff on defendant's counterclaim in the admitted sum of \$551.32, with interest thereon at 6% per annum from January 31, 1921, until paid.

Dated this 4th day of December, 1922.

R. S. BEAN,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within findings of fact and conclusions of law is hereby accepted in Multnomah County, Oregon, this 4th day of December, 1922, by receiving a copy thereof, duly certified

to as such by S. J. Graham, one of attorneys for defendant.

SAMUEL B. LAWRENCE,
Of Attorneys for Plaintiff.

Filed December 4, 1922. G. H. Marsh, Clerk.
By E. M. Morton, Deputy. [31]

AND AFTERWARDS, to wit, on Monday, the 4th day of December, 1922, the same being the 24th judicial day of the regular November term of said court. Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [32]

In the District Court of the United States for the
District of Oregon.

No. L-8874—(AT LAW).

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Judgment.

On this day this cause come on to be heard upon the application of the defendant for the entry of a judgment against the plaintiff in accordance

with the findings of fact and conclusions of law heretofore made and entered herein.

And it appearing to the Court that the application should be granted, it is

ORDERED that plaintiff's complaint be and the same is hereby dismissed with prejudice, and that the defendant do have and recover of and from the plaintiff the sum of \$551.32, together with legal interest thereon from January 31, 1921, until paid, and its costs and disbursements incurred herein, and that execution issue therefor.

Dated the 4th day of December, 1922.

R. S. BEAN,
Judge.

Filed December 4, 1922. G. H. Marsh, Clerk.
By E. M. Morton, Deputy. [33]

AND AFTERWARDS, to wit, on the 2d day of June, 1923, there was duly filed in said court, a petition for writ of error in words and figures as follows, to wit: [34]

In the District Court of the United States for the
District of Oregon.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff and Plaintiff in Error,
vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,
Defendant and Defendant in Error.

Petition for Writ of Error.

Owen M. Bruner Company, a corporation, plaintiff in the above-entitled cause, conceiving itself aggrieved by the final order and judgment of this Court made and entered against it and in favor of the defendant on the 4th day of December, 1922, and rulings in said cause made as set forth in its assignment of errors herein filed, petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith under and in accordance with the rules of the United States Circuit Court of Appeals in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals, and relative thereto plaintiff respectfully shows:

That by reason of the premises plaintiff alleges manifest error has happened to the great damage of the Owen M. Bruner Company, a corporation, plaintiff herein.

That plaintiff has filed herewith its assignment of errors upon which it relies and will urge in the said Appellate Court: [35]

Wherefore, plaintiff prays that a writ of error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit, to this court, for the correction of the errors so complained of, and that transcript of the records, proceedings, papers and all things concerning the same upon which said judgment was made, duly authenticated may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that plaintiff recover judgment as demanded in its complaint.

PLATT & PLATT, MONTGOMERY &
FALES,

Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

Service of the within petition for writ of error, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 2d day of June, 1923.

S. J. GRAHAM,
Of Attorneys for Defendant.

Filed June 2, 1923. G. H. Marsh, Clerk. [36]

AND AFTERWARDS, to wit, on the 2d day of June, 1923, there was duly filed in said court, an assignment of errors in words and figures as follows, to wit: [37]

In the District Court of the United States for the
District of Oregon.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Assignment of Errors.

Comes now the plaintiff above named, appearing by Messrs. Platt & Platt, Montgomery & Fales, its attorneys, and says that the judgment and final order of this Court made and entered in the above-entitled cause on December 4th, 1922, in favor of the defendant, O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, and against this plaintiff, is erroneous and against the just rights of said plaintiff, and files herein, together with its petition for a writ of error from said judgment and order, the following assignment of errors, which it avers occurred in the proceedings in said cause, upon which said final judgment is based:

I.

The above Court erred in its special finding of fact #2 as follows:

“That the plaintiff has failed to sustain the averments of its complaint, and in particular

has failed to prove that Ashenfelter, the alleged agent of the defendant, had authority to accept the alleged order set out in plaintiff's complaint."

upon the ground and for the reason that the evidence is insufficient to sustain said finding, and upon the ground and for the further reason that the matter in controversy herein, related to a contract referred to in paragraph IV of the complaint, and that the order referred to in said special finding #3 was subsidiary [38] to the said contract, and that the said contract was made by letters and telegrams which were prepared by and in the language of the defendant company, and its officers and agents;

That said orders were subsidiary to said contract, and were not the contract itself, and that the affirmative answer shows that the contract between the plaintiff and defendant was made upon the letter of inquiry of November 14th, 1919, which was in the language of said Ashenfelter, and was submitted to and acted upon directly by the defendant itself, through its president, and the telegraphic correspondence, relative to said proposal, was in the language of and conducted by the officers of the said defendant with the said Ashenfelter, who in turn received the plaintiff's confirmation of said contract so made;

Upon the further ground that the evidence and the record show that:

(a) Paragraphs I and II of the plaintiff's complaint are admitted;

(b) That the divers citizenship of the respective parties, and the amount in controversy, were proven;

(c) That the contract referred to in said complaint was made by letter and telegraphic correspondence, as appears by the exhibits in evidence, to wit: (1) Plaintiff's Exhibit 23, and by telegrams passing between the defendant company and its agent, Ashenfelter, dated November 20th, 1919, and November 21st, 1919, and by correspondence between the defendant, through Ashenfelter, and the plaintiff, on November 21st and 22d, 1919, and by a letter from the defendant company to Ashenfelter dated November 24th, 1919, authorizing the making of said contract upon terms contained therein, which were accepted by plaintiff;

(2) The plaintiff opened negotiations with the defendant for the contract in question, by reason of defendant's letter to plaintiff of August 4th, 1919, and that Ashenfelter [39] acted as the Eastern manager of defendant company, advertised himself as such with defendant's knowledge, and his cards and letter-heads and stationery were printed with defendant's approval and at defendant's expense, and designated him as the eastern manager of defendant;

(3) That the original letter of inquiry dated November 14th, 1919, was susceptible of construction both as an inquiry for random widths and lengths of lumber, and for specific widths and lengths of lumber, and the orders for lumber

thereunder were within the limits of the ranges of sizes and lengths specified in said letter, and in the letter from defendant company to Ashenfelter dated November 24th, 1919;

(4) That the plaintiff offered to accept the performance of said contract as construed by defendant, and defendant never fulfilled said contract;

(5) That the telegram from defendant company to Ashenfelter, reading as follows:

“Letter tenth we have cancelled Bruner’s order 11385 account cannot furnish and ship specified lengths Nothing shipped on this order Account unable to secure cars

O. R. MENEFEE CO.”

gives specific reason for nonfulfillment of the contract and order, and does not specify or say that the contract is unilateral or lacking in mutuality, or raise any question of any misunderstanding on the contract itself, nor does it assert that there was any misunderstanding as to any of the terms of the contract itself;

(6) That the lumber involved within the contract so made by the letter of November 14th, 1919, and the telegrams referred to, increased in price after the making of said contract to an amount which sustained plaintiff’s claim for damages as set forth in the complaint;

(7) That the orders so placed by plaintiff were within [40] the limits of the specifications of the contract, and that plaintiff offered to accept the performance of said contract as construed by defendant.

(d) That the plaintiff, relying upon the above agreement, and at plaintiff's great cost and expense, advertised and offered for sale to its clients the stock of lumber involved therein;

(e) That the orders referred to in said finding are shipping instructions;

(f) That the defendant refused to fulfill its contract with plaintiff, and cancelled the order so given;

(g) That plaintiff made demands on defendant to fulfill said agreement, but defendant neglected, failed and refused to do so;

(h) That the average cars of Douglas fir rough lumber consist of from 21,000 feet to 28,000 feet;

(i) At the time defendant refused to fulfill its contract with plaintiff, the said lumber had advanced approximately \$16.50 per thousand in price;

(j) The amount of plaintiff's damages are capable of actual ascertainment.

II.

The above-entitled Court erred in its special finding #3 as follows:

“That the alleged order is unilateral and wanting in mutuality”

upon the ground that the evidence is insufficient to sustain said finding, and the evidence shows that the defendant did not assign such ground or reason for cancelling the orders. In support of the specifications of insufficiency to support this said finding, the plaintiff, and plaintiff in error, refers to the designations heretofore set forth under

error #1, showing wherein the evidence is [41] insufficient to sustain special finding #2, and incorporates them herein as if set forth at length hereat.

III.

The above-entitled Court erred in its conclusions of law as follows:

“That the defendant is entitled to a judgment dismissing the plaintiff’s complaint with costs, and for a judgment against the plaintiff on defendant’s counterclaim in the admitted sum of \$551.32, with interest thereon at 6% per annum from January 31st, 1921, ’till paid,”

upon the ground and for the reasons set forth in the specifications of insufficiency of evidence to sustain the Court’s special finding #2, and also to sustain the Court’s special finding #3, and also upon the following grounds:

(a) That by the evidence, the right of the plaintiff to recover the sum sought in its complaint was established, and that the counterclaim in favor of the defendant should have been credited upon said amount, and that no judgment should have been rendered in favor of the defendant, but an affirmative judgment should have been rendered in favor of the plaintiff, and against the defendant for the difference between the amount plaintiff owed defendant, and the amount alleged in the complaint as plaintiff’s claim.

IV.

The above-entitled Court erred in entering judg-

ment in favor of the defendant, and against the plaintiff, for any sum whatsoever, and erred in not entering judgment in favor of the plaintiff, and against the defendant, for the difference between the amount claimed in the complaint, and the counterclaim which plaintiff owed defendant.

V.

The Honorable Court erred in rendering judgment dismissing plaintiff's complaint, and disallowing plaintiff's claim, upon the ground that the special findings of the Court do not support [42] the judgment, and are not supported by the pleadings or the record.

VI.

The Honorable Court erred in not finding damages to plaintiff in a definite amount, and in not crediting the amount of the counterclaim admitted to exist in favor of defendant against plaintiff upon such sum, and erred in not rendering judgment for the excess over said counterclaim of plaintiff's claim, in favor of plaintiff.

WHEREFORE, the said plaintiff, and plaintiff in error, prays that the judgment of said Court be reversed, and such directions be given that full force and efficacy may inure to the plaintiff by reason of the cause of action set up in its complaint, and that judgment be entered in favor of the plaintiff in accordance with the demand of its complaint filed in said cause.

PLATT & PLATT, MONTGOMERY &
FALES,

Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

Service of the within assignment of errors, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 2d day of June, 1923.

S. J. GRAHAM,
Of Attorneys for Defendant.

Filed June 2, 1923. G. H. Marsh, Clerk. [43]

AND AFTERWARDS, to wit, on Saturday, the 2d day of June, 1923, the same being the 74th judicial day of the regular March term of said court. Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [44]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Order Allowing Writ of Error, Staying Proceedings and Fixing the Amount of Bond.

This 2d day of June, 1923, came the plaintiff, above named, Owen M. Bruner Company, appearing by Messrs. Platt & Platt, Montgomery & Fales, its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a writ of error from the decision and judgment of this Court, made and entered herein on the 4th day of December, 1922, in favor of O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, the defendant above named and against said plaintiff, and the rulings made upon the trial of the above-entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit, to this court, together with its assignment of errors intended to be urged by it within due time, and also praying that a transcript of the record and proceedings and papers upon which the said judgment herein was rendered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which plaintiff shall give and furnish upon said writ or error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that such other

and further proceedings [45] may be had as may be proper in the premises.

NOW, THEREFORE, on consideration thereof, this Court does allow said writ of error upon said plaintiff filing with the clerk of this court a good and sufficient bond in the sum of Fifteen Hundred Dollars (\$1500.00); to the effect that if the said plaintiff, Owen M. Bruner Company, a corporation, shall prosecute the said writ of error to effect and answer all damages and costs if plaintiff fails to make its complaint good, then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the Court, and it is ordered that all further proceedings in this court be, and the same are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals, and that said bond shall operate as a supersedeas bond.

Dated this 2d day of June, 1923.

CHAS. E. WOLVERTON,
Judge.

Filed June 2, 1923. G. H. Marsh, Clerk. [46]

AND AFTERWARDS, to wit, on the 2d day of June, 1923, there was duly filed in said court, a bond on writ of error in words and figures as follows, to wit: [47]

In the District Court of the United States for the
District of Oregon.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN MURPHY CO., a
Corporation,

Defendant.

Bond on Writ of Error and Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS,
that we, the Owen M. Bruner Company, a corpora-
tion, principal, and American Surety Company of
New York, a corporation, surety, are held and
firmly bound unto O. R. Menefee Lumber Co., a
corporation, now known as Allen Murphy Co., a
corporation, the above-named defendant, in the
sum of Fifteen Hundred Dollars (\$1500.00), to be
paid to the said O. R. Menefee Lumber Co., a cor-
poration, now known as Allen Murphy Co., a cor-
poration, its successors and assigns, to which pay-
ment well and truly to be made we bind ourselves
and each of us, jointly and severally, and our and
each of our successors or assigns, firmly by these
presents.

Sealed with our seals and dated this 2d day of
June, 1923.

WHEREAS, the above-named Owen M. Bruner
Company, a corporation, is prosecuting a writ of

error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Oregon, entered on the 4th day of December, 1922.

NOW, the consideration of this obligation is such that if the above-named Owen M. Bruner Company, a corporation, shall [48] prosecute said writ of error to effect, and answer all costs and damages if it shall fail to make good its complaint, then this obligation to be void; otherwise to remain in full force and effect.

OWEN M. BRUNER COMPANY.

By Isham N. Smith,

Attorney.

AMERICAN SURETY CO. OF NEW
YORK.

By W. A. King,
Resident Vice-President.

[Seal]

Attest: E. LIEMAN,
Resident Agent. Sec.

W. A. KING,
Agent.

Examined and approved this 2d day of June,
1923.

CHAS. E. WOLVERTON,
Judge.

United States of America,
District of Oregon,—ss.

Service of the within bond on writ of error and supersedeas bond by certified copy thereof, as re-

quired by law, is hereby acknowledged at Portland, Oregon, this —— day of June, 1923.

S. J. GRAHAM,

Of Attorneys for Defendant.

Filed June 2, 1923. G. H. Marsh, Clerk. [49]

AND AFTERWARDS, to wit, on the 14th day of June, 1923, there was duly filed in said court, the evidence introduced at trial of the cause, in words and figures as follows, to wit: [50]

In the District Court of the United States for the District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN-MURPHY CO., a
Corporation,

Defendant.

**Certificate of the Judge Identifying Testimony
Given at the Trial of Said Cause.**

United States of America,
State and District of Oregon,—ss.

I, Robert S. Bean, Judge of the above court, who tried the above cause, do hereby certify that the following evidence, and none other, was introduced at the trial of the above cause, to wit:

(1) The depositions of Owen M. Bruner and W. C. Ashenfelter, now on file in the above cause, taken at Philadelphia, Pennsylvania;

(2) The oral testimony of witnesses, J. E. Manley and J. P. Keating on behalf of the plaintiff, and H. B. Van Duzen on behalf of the defendant, as transcribed and certified by Mary E. Bell, official stenographer who reported said cause.

A copy of all said evidence and depositions certified as true by the clerk of the above court, is attached hereto.

Dated at Portland, Oregon, this, the 12th day of June, 1923.

R. S. BEAN,

Judge. [51]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER CO., a Corporation,
Now Known as ALLEN-MURPHY CO., a
Corporation,

Defendant.

Philadelphia, Pa., Thursday, June 29, 1922.

Owen M. BRUNER	1
Cross	34
Redirect	57
Recross	62
W. C. ASHENFELTER	64
Cross	79
Redirect	95
Recross	102

EXHIBITS:

Plaintiff's Ex. No. 1	3
(Letter dated 8-4-1919, from O. R. Menefee Co., to Owen M. Bruner Co.)	
Plaintiff's Ex. No. 2	4
(Letter dated August 11, 1919, from Owen M. Bruner Co., to O. R. Menefee Co.)	
Plaintiff's Ex. No. 3	6
(Name card of O. R. Menefee Company.)	
Plaintiff's Ex. No. 4	9
(Order dated Nov. 21, 1919, from Owen M. Bruner Co. to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 5	11
(Letter dated Nov. 22d, '19, from W. C. Ashenfelter to Owen M. Bruner Co.)	
Plaintiff's Ex. No. 6	13
(Order dated Nov. 25, 1919, from Owen M. Bruner Co., to W. C. Ashenfelter and corrected order of Nov. 25, 1919, from Owen M. Bruner Co., to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 7	16

(Sub-order dated Dec. 13, 1919, from Owen M. Bruner Co., to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 8	18
(Order dated Dec. 29, 1919, from Owen M. Bruner Co., to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 9	20
(Telegram dated Dec. 19th, 1919, from O. R. Menefee Co. to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 10	21
(Letter dated Dec. 18, 1919, from O. R. Menefee Co., to W. C. Ashenfelter.)	
[52]	
Plaintiff's Ex. No. 11	23
(Letter dated 12-20-19, from Owen M. Bruner Co., to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 12	25
(Letter dated 1-20-20, from Owen M. Bruner Co. to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 13.....	27
(Letter dated 1-31-20, from Owen M. Bruner Co., to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 14	29
(Letter dated Sept. 3d, 1920, from Owen M. Bruner Co., to Allen-Murphy Lumber Co., successors to O. R. Menefee Co.)	
Defendant's Ex. No. 15	37
(Letter dated Feb. 27, 1920, from O. R. Menefee Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 16	38
(Letter dated March 19, 1920, from O. R. Menefee Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 17	39

(Letter dated April 21, 1920, from O. R. Menefee Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 18	40
(Letter dated May 19, 1920, from O. R. Menefee Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 19	40
(Letter dated June 17, 1920, from Allen-Murphy Lumber Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 20	41
(Letter dated July 29, 1920, from Allen-Murphy Lumber Co., to Owen M. Bruner Co.)	
Defendant's Ex. No. 21	42
(Letter dated Aug. 27, 1920, from Allen-Murphy Lumber Co. to Owen M. Bruner Co.)	
Defendant's Ex. No. 22	50
(Letter dated Dec. 2, 1919, from O. R. Menefee Co. to W. C. Ashenfelter.)	
Defendant's Ex. No. 23	56
(Letter dated Nov. 14, '19, from W. C. Ashenfelter to O. R. Menefee Co.)	
Plaintiff's Ex. No. 24	66
(Printed envelope.)	
Plaintiff's Ex. No. 25	67
(Printed envelope.)	
Plaintiff's Ex. No. 26	70
(Telegram dated Nov. 20, 1919, from O. R. Menefee Co.; to W. C. Ashenfelter.)	
Plaintiff's Ex. No. 27	71

(Telegram dated Nov. 21, '19, from W. C.
Ashenfelter to O. R. Menefee Co.)

Plaintiff's Ex. No. 28 72

(Letter dated Nov. 24, 1919, from O. R.
Menefee Co. to W. C. Ashenfelter.)

Defendant's Ex. No. 29 87

(Letter dated Dec. 23, 1919, from O. R.
Menefee Co., to W. C. Ashenfelter.)

Defendant's Ex. No. 30 88

(Letter dated Dec. 30, 1919, from O. R.
Menefee Co., to W. C. Ashenfelter.)

Defendant's Ex. No. 31 89

(Letter dated Feb. 2, 1920, from O. R.
Menefee Co. to W. C. Ashenfelter.)

Plaintiff's Ex. No. 32 96

(Letter dated Jan. 10, '20, from W. C.
Ashenfelter to O. R. Menefee Co.) [53]

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEЕ LUMBER CO., a Corporation,
Now Known as ALLEN-MURPHY Co., a
Corporation,

Defendant.

Depositions of Owen M. Bruner and W. C. Ashenfelter, witnesses on behalf of the plaintiff, taken pursuant to agreement of counsel, before T. Roy Phillips, Esq., notary public, at Room 1100 Land Title Building, Philadelphia, Pa., on Thursday, June 29, 1922, at 3 P. M.

Present: ARTHUR E. WEIL, Esq., and
ALBERT L. MOISE, Esq., representing the
plaintiff.

S. J. GRAHAM, Esq., representing the de-
fendant.

Deposition of Owen M. Bruner, for Plaintiff.

OWEN M. BRUNER, having been duly sworn,
was examined and testified as follows:

(By Mr. MOISE.)

Q. What is your full name?

A. Owen M. Bruner.

Q. And your business?

A. Wholesale lumber business, the buying and
selling of lumber.

Q. What relation have you to the Owen M.
Bruner Company, the plaintiff in this case?

A. President.

Q. How long have you been in the lumber busi-
ness?

A. I have been in business since 1894, but I have
been in the business practically since 1882.

Q. Have you as the president and acting for the
Owen M. Bruner Company had any dealings with
the O. R. Menefee Lumber Company, of Portland,
Oregon? A. Yes, sir.

(Deposition of Owen M. Bruner.)

Q. I show you a letter dated 8-4-1919 on the letter-head of the O. R. Menefee Company, purporting to be signed by O. R. Menefee, addressed to Owen M. Bruner Company, and ask you if you received that letter [54] from said company? A. Yes, sir.

Q. Is that letter in reply to a letter addressed by you to the O. R. Menefee Company? A. Yes, sir.

Q. Have you a copy of the letter to which that is a reply?

A. I have not got it here. According to the contents of this letter, it refers to a Myerstown order.

Q. Never mind reading it. A. All right.

Mr. MOISE.—I offer that letter in evidence.

Letter dated 8-4-1919, signed by O. R. Menefee, addressed to the Owen M. Bruner Company, marked Plaintiff's Exhibit No. 1, June 29, 1922, T. R. P., reading as follows:

Plaintiff's Exhibit No. 1.

“8-4-1919.

Stamp

Owen M. Bruner Co., Phila.,

Rec'd Aug. 9, 1919.

“Owen M. Bruner Company,
Colonial Trust Building,
Philadelphia, Pa.

“Gentlemen:

We have your esteemed favor of July 29th, and note that you do not apprehend any trouble with the Myerstown order.

For your information we have the best salesman in the United States, located in Philadelphia, Mr. W. C. Ashenfelter, Builders Exchange Building. In the future you will please take any matters pertaining to prices, up with him, and you will get quicker results than if you wrote here.

By the way; your prices offered on timbers, lengths, thirty-six to forty feet, is exactly \$4.50 too low. We are shipping all the timbers we can make on \$24.00 basis, and that means all lengths, twelve to forty feet.

We hope to do a nice business with you this year and invite your inquiries. We are very strict on our terms, however, and until we get better acquainted we expect ninety per cent cash within [55] fifteen days from date of invoice.

“Yours very truly,

“O. R. MENELEE.”

ORM:ER

Mr. MOISE.—I call for the original of the reply to the above letter dated August 11, 1919, from the Owen M. Bruner Company to the O. R. Menefee Company.

(Original not produced.)

Mr. MOISE.—I offer in evidence copy of letter dated August 11, 1919, from Owen M. Bruner Company to O. R. Menefee Company.

Mr. GRAHAM.—It is objected to as incompetent, immaterial and irrelevant.

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. Did you reply to that letter (Plaintiff's Exhibit No. 1)? A. Yes, sir.

Q. Is this the copy? A. Yes, sir.

Q. That is your reply?

A. Yes, sir, that is my answer.

Mr. MOISE.—I offer that copy in evidence.

Mr. GRAHAM.—I make the same objection.

(The copy is marked Plaintiff's Exhibit No. 2, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 2.

“August 11, 1919.

“O. R. Menefee Company,
Portland, Oregon.

“Gentlemen:

Replying to yours of the 4th inst., we must have the 10 pcs. 2x10-40 omitted from the Myerstown order. You can fill out the balance of the car with 6x6, 8x8, 3x10, 3x12-36' to 40' long, Choice #1 Common in the rough at a price of \$50.50 delivered f. o. b. cars Atlantic City, N. J. We are more than splitting the difference with you on this transaction.
[56]

If you will look up your letters of July 18th, you will note that you stated you would ship the 10 pcs. 2x10-40 which we must have. We want these 2x10-40 shipped in the first car for reshipment to Myerstown. Let the second car containing the 6x8, 8x8, 3x10, 3x12 come along as soon as possible.

(Deposition of Owen M. Bruner.)

In regard to the second paragraph of your letter we are glad that you appreciate Mr. W. C. Ashenfelter, one of our fellow citizens, whom we have known for many years, as a thorough salesman and you are telling us nothing new when you acknowledge that you have 'the best salesman in the United States.'

Relative to terms. We desire to discount our purchase for 80% of the invoice or 90%, if that is your custom, but we must have the invoice in hand to do this. These are the terms agreed upon with Mr. Ashenfelter at time of purchase.

Please let us hear from you relative to the shipment to Atlantic City, and oblige,

"Yours very truly,

"OWEN M. BRUNER COMPANY."

OMB-D

CC-W. C. Ashenfelter.

(By Mr. MOISE.)

Q. Did you receive a card with the name of "O. R. Menefee Company, W. C. Ashenfelter, Eastern Manager, Builders Exchange, Philadelphia" printed thereon? A. Yes, sir.

Q. Is that the card? A. Yes, sir.

Mr. MOISE.—I offer that card in evidence.

Mr. GRAHAM.—It is objected to as incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings in this suit.

The card is marked Plaintiff's Exhibit No. 3, June 29, 1922, T. R. P., reading as follows: [57]

(Deposition of Owen M. Bruner.)

Plaintiff's Exhibit No. 3.

“O. R. MENEFEE COMPANY,

“Douglas Fir Company,

“Timbers a Specialty.

“1400 Yeon Building, Portland, Oregon.

“W. C. Ashenfelter,

Eastern Manager,

Builders' Exchange, Philadelphia.”

(By Mr. MOISE.)

Q. Did you show to W. C. Ashenfelter the letter which you received from the O. R. Menefee Lumber Company, which has been offered in evidence, marked Plaintiff's Exhibit No. 1 in this case?

A. Yes, sir.

Q. Did you have any dealings with W. C. Ashenfelter acting as the representative of the O. R. Menefee Lumber Company in November, 1919?

Mr. GRAHAM.—That is objected to on the ground that the question assumes a fact not proven. The agency, if any, disclosed by the letter, which has been offered in evidence, is a special and limited agency, and the evidence sought to be elicited is incompetent, immaterial and irrelevant. A. Yes, sir.

(By Mr. MOISE.)

Q. Had you had any dealings with the O. R. Menefee Lumber Company through W. C. Ashenfelter prior to November, 1919?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and ir-

(Deposition of Owen M. Bruner.)

relevant, and not within the issues made in the pleadings. A. Yes, sir.

(By Mr. MOISE.)

Q. What was the nature of those transactions?

Mr. GRAHAM.—The same objection.

A. The purchases of lumber from Ashenfelter which were filled by Menefee.

Q. And for whom was Ashenfelter acting in those transactions?

Mr. GRAHAM.—The same objection.

A. For Menefee. [58]

(By Mr. MOISE.)

Q. And how many such transactions took place?

Mr. GRAHAM.—The same objection.

A. Three or four. Possibly more.

(By Mr. MOISE.)

Q. Extending over what period of time?

Mr. GRAHAM.—The same objection.

A. Several months.

(By Mr. MOISE.)

Q. As a result of your negotiations with W. C. Ashenfelter, acting as the representative of the O. R. Menefee Lumber Company in November, 1919, did you give him an order for the purchase of lumber?

Mr. GRAHAM.—That is objected to for the reason that it assumes a fact not proven, and for the further reason that it is incompetent, immaterial and irrelevant. It tends to prove a contract not pleaded in the complaint. A. Yes, sir.

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. What was the date of November, 1919, on which you gave him the original order?

Mr. GRAHAM.—That is objected to on the ground that it is immaterial incompetent and irrelevant, and not within the issues made in the pleadings.

A. November 21st.

(By Mr. MOISE.)

Q. I show you a paper dated November 21, 1919, addressed to W. C. Ashenfelter, and signed by Owen M. Bruner Company, and ask you to state what that is.

Mr. GRAHAM.—That is objected to, on the ground that it is incompetent, immaterial and irrelevant. [59]

A. This order of November 21, 1919, is the result of a purchase made from Mr. Ashenfelter and a sale to him by me. He returned this letter stating that the price was not according to our understanding, and there is a notation here in Mr. Ashenfelter's handwriting, "Returned for correction in price."

Mr. MOISE.—I offer that paper in evidence.

Mr. GRAHAM.—I object to it on the ground that it is incompetent, irrelevant and immaterial, and not within the issues made in the pleadings.

The paper is marked Plaintiff's Exhibit No. 4, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 4.

“Send all invoices with Bill of Lading to this office.

Order No. 11384.

Please enter the above number on your invoice.
Southard's Code Used.

OWEN M. BRUNER COMPANY.
WHOLESALE LUMBER.

(Stamp) Owen M. Bruner Co., Phila.

Rec'd Nov. 24, 1919.

Philadelphia, Pa., Phila., November 21, 1919.
To W. C. Ashenfelter, Builders' Exchange, Philadelphia, Penna.

Please ship from Owen M. Bruner Company to
Owen M. Bruner Company at shipping instructions
to be supplied

Railroad delivery to be supplied

Enter in bill lading

Rate not to exceed ———

Route via ———

#1 COMMON DOUGLAS FIR—ROUGH

25 cars 4x4 to 12x12 (with some larger sizes) 12
to 40' long. Price delivered on a New York
or 80¢ rate\$46.50 M.
Price delivered on a 78¢ rate of freight

..... 46.00 M.

To be shipped in sizes and lengths as wanted.
We shall immediately begin a campaign for orders
and will send same in to you as [60] soon as
we book the business.

(Deposition of Owen M. Bruner.)

This covers order given you over 'phone this afternoon;

Acknowledge.

Prices F. O. B. cars as above. Cash Discount 2%.

Commission — (in pencil) Returned for correction in price.

When to ship As wanted.

Please acknowledge receipt of this order by return mail.

Yours truly,

OWEN M. BRUNER CO.

OMB—D

Do not Stencil your Name or Advertisement on Car."

(By Mr. MOISE.)

Q. When Mr. Ashenfelter returned that paper, did he send you a letter?

A. He did, under date of November 22, 1919. This letter is written on Menefee's letter-head, with the name of W. C. Ashenfelter, Eastern Manager, Builders' Exchange, Philadelphia, Pa., thereon, showing the authority for Ashenfelter's statement in the letter that he made a mistake in the price of \$46, and it should be \$48. We corrected the typographical error, and sent him an order to conform to the understanding correcting the price.

Mr. GRAHAM.—I move to strike out the answer of the witness as a conclusion. The instrument speaks for itself.

Mr. MOISE.—I offer that letter in evidence.

(Letter marked Plaintiff's Exhibit No. 5, June 29, 1922, T. R. P.)

Mr. GRAHAM.—I object to the reception in evidence of the letter just offered on the ground that it is incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings.

The letter reads as follows:

Plaintiff's Exhibit No. 5.

“W. C. Ashenfelter, Eastern Manager

“Builders' Exchange

“Philadelphia, Pa.

B. W P

OWEN M. BRUNER CO., Phila.

Rec'd Nov. 24, 1919

Answered

Int. — File —

1 2 3 4

Philada.

~~Portland, Oregon~~ Nov. 22d-19

[61]

“Messrs. Owen M. Bruner Co.,

“Philada.

“Gentlemen:

“I am just in receipt of your favor of the 21st inst., confirming telephone order, but hasten to call your attention to the fact that you have noted \$46.00 instead of \$48.00. I do not know whether this is a typographical error or what, but you could not have misunderstood me over the phone,

(Deposition of Owen M. Bruner.)

as you repeated the prices to me yourself two or three times, saying \$48.00 on Philada frt rate and to make it \$48.50 on N. Y. rate, after my phoning you as plainly as I could speak that the best Menefee could do would be \$48.00 and that he would only accept half of the order at that, or about twenty-five cars, and them for immediate wire acceptance.

“I also mailed you a confirmation of my telegram to Menefee so as to cinch his offer before he could have time to raise the price.

“Will you therefore please correct the prices in your letter of the 21st, which I am taking the liberty to return herewith for such correction, and oblige.

“Yours very truly,

W. C. ASHENFELTER.”

WCA-A.

(By Mr. MOISE.)

Q. Did you send a corrected order to Ashenfelter? A. Yes, sir.

Q. I show you a paper dated November 25, 1919, signed Owen M. Bruner Company, addressed to W. C. Ashenfelter, and ask you what that is?

A. This is the corrected order in answer to Ashenfelter's letter of the 22d correcting the price, so stated in the corrected order, and on the order is written by Ashenfelter, “referred to O. R. M. Company, Ash, 11-25-19.” I also have here an acceptance of the order, “W. C. Ashenfelter; Agent for O. R. Menefee Company.”

Mr. MOISE.—I offer that paper in evidence as Plaintiff's Exhibit No. 6. [62]

Mr. GRAHAM.—It is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made in the pleadings.

Plaintiff's Exhibit No. 6 reads as follows:

Plaintiff's Exhibit No. 6.

"Send all invoices with bill of Lading to this Office.

Order No. 11385.

Please enter the above number on your invoice.

OWEN M. BRUNER COMPANY.

Wholesale Lumber.

Southard's Code used.

Philadelphia, Pa., November 25, 1919.

To W. C. Ashenfelter, Builders' Exchange, Philadelphia, Pa.

Please ship from Owen M. Bruner Company to Owen M. Bruner Company at Shipping instructions to be supplied.

Railroad Delivery To be supplied.

Enter in Bill Lading

Rate not to exceed ——

Route via ——

#1 COMMON DOUGLAS FIR—ROUGH.

25 cars 2x4 to 12x12 (with some larger sizes) 12 to 40 ft. long. Price delivered on a New York or 80¢ rate \$48.50
Price delivered on a 78¢ rate of freight 48.00

To be shipped in sizes and lengths as wanted.
We shall immediately begin a campaign for orders
and will send same to you as soon as we book the
business.

This order covers order given you over 'phone
on November 21st, and bears correction as per
your letter of the 22d inst.

Prices F. O. B. Cars As above
Commission Cash Discount 2%
When to Ship As wanted.

Please acknowledge receipt of this order by re-
turn mail.

Yours truly,
OWEN M. BRUNER & CO.

OMB-O

(In ink) Referred to
O. R. M. Co.

Ash. 11-25-19

Do not Stencil Your name or Advertisement on
Car." [63]

"11385

"November 25, 1919.

W. C. Ashenfelter, Builders' Exchange, Philadel-
phia, Pa., from Owen M. Bruner Company to
Owen M. Bruner Company

Shipping instructions to be supplied

To be supplied

#1 COMMON DOUGLAS FIR—ROUGH

25 cars 2x4 to 12x12 (with some larger sizes) 12 to
40 ft. long. Price delivered on a New York
or 80¢ rate \$48.50
Price delivered on a 70¢ rate of freight 48.00

(Deposition of Owen M. Bruner.)

To be shipped in sizes and lengths as wanted. We shall immediately begin a campaign for orders and will send same to you as soon as we book the business.

This order covers order given you over 'phone on November 21st, and bears'corrèction as per your letter of the 22d inst.

As above

As wanted

W. C. Ashenfelter.

Agt.

2%

For O. R. Menefee Co."

OMB-D

(By Mr. MOISE.)

Q. Did you subsequent to November 25, 1919, send to W. C. Ashenfelter, as Agent of O. R. Menefee Company, shipping instructions for some of the lumber described in said order?

Mr. GRAHAM.—I object to that question because it assumes a fact not proven, and it is incompetent, immaterial and irrelevant, and not within any of the issues made in the pleadings.

A. I did. On December 13, 1919, we sent an order, or a suborder to apply on the original purchase. That is a miscellaneous list of sizes.

Mr. MOISE.—I offer that in evidence.

Mr. GRAHAM.—I object to the reception of that paper in evidence on the ground that it is incompetent, immaterial and irrelevant, and does not tend to prove any of the issues made by the pleadings. [64]

The paper is marked Plaintiff's Exhibit No. 7, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 7.

“Send all invoices with Bill of Lading to this Office.

Order No. 11385-A (To apply on our purchase of 11-25-19)

Please enter the above number on your invoice.

OWEN M. BRUNER COMPANY,
Wholesale Lumber.

Southard's Code used.

Philadelphia, Pa., December 13, 1919.

To W. C. Ashenfelter, Builders' Exchange, Philadelphia, Penna.

Please Ship from Owen M. Bruner Company to Owen M. Bruner Company at Hammonton, New Jersey

Railroad Delivery	Philadelphia & Reading
Enter in Bill Lading	Rate not to exceed —
	Route via —

#1 COMMON DOUGLAS FIR ROUGH

A. 2x 6—50-24, 20-32, 20-28)	
B. 2x 8—50-24, 20-32, 20-28)	
C. 3x 6—10-32, 10-24)	
D. 3x 8—10-20, 10-24, 10-28, 10-32)	
E. 3x12—10-20, 10-24, 10-28, 10-32, 10-36)	at \$48.50
F. 4x 6—25-24, 20-32, 10-36)	
G. 6x 6—10-24, 10-28, 10-32, 5-40)	
H. 8x 8—10-20, 10-24, 10-32, 5-40)	
I. 6x 8—10-20, 10-24, 10-32, 5-40)	

(Deposition of Owen M. Bruner.)

This order makes a total of about....28,000 ft.

This is to apply on our purchase, order #11385 sent you under date of the 25th ulto.

(In pencil) Ash's

#123

12-15-19

Prices F. O. B. cars Hammonton, N. J. (80c rate of freight.)

Commission —

Cash Discount 2%

When to ship. As soon as possible.

Please acknowledge receipt of this order by return mail.

CC-O. R. Menefee Co.

Yours truly,

OWEN M. BRUNER CO.

OMB-D

Do not Stencil Your Name or Advertisement on Car." [65]

(By Mr. MOISE.)

Q. You call that paper a suborder. Please explain what you mean by that.

A. I mean by "Suborder" that it is a portion of the whole. It is a portion of the original order for 25 cars. This is one of the 25 cars.

Q. I show you another paper dated December 29, 1919, signed by Owen M. Bruner Company, addressed to W. C. Ashenfelter, and ask you what that paper is.

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant.

(Deposition of Owen M. Bruner.)

A. This paper is dated December 29, 1919, and was given to apply as another order of miscellaneous sizes on the original order.

Mr. MOISE.—I offer that paper in evidence.

Mr. GRAHAM.—It is objected to on the ground that is incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings.

The paper is marked Plaintiff's Exhibit No. 8, June 29, 1922, T. R. P. and reads as follows:

Plaintiff's Exhibit No. 8.

“Send all invoices with Bill of Lading to this Office.

Order No. 11385-B.

Please enter the above number on your invoice.

OWEN M. BRUNER COMPANY

Wholesale Lumber

Southard's Code used.

Philadelphia, Pa., December 29, 1919.

To W. C. Ashenfelter, Wissahickon & Coulter St.,
Philadelphia, Pa.

Please ship from Owen M. Bruner Company to
Owen M. Bruner Company at Attica, New York.
Railroad Delivery. Erie Delivery.

Enter in Bill Lading.

Rate not to exceed ——

Route via —— [66]

(Deposition of Owen M. Bruner.)

#1 DOUGLAS FIR—ROUGH (#1 COMMON)

A.	8x 8—	20-24	20-28	20-32)	
B.	6x 8—	30-32)	
C.	6x 6—	40-32)	at \$48.50 delivered
D.	4x 6—	100-24	40-16)	on a New York or
E.	4x 4—	100-16	200-20	100-24)	80c rate of freight
F.	2x12—	100-34	100-32	100-30)	
G.	2x10—	100-28)	
H.	10x10—	10-28	20-32)	

This order applies on our order of #11385 given you on Nov. 25th, and we are noting that you are sending this order out to the mill, as per your conversation over the 'phone this morning.

Our customer wants a wire answer as to when he may receive this shipment.

(In pencil) Ash's #124

12-29-19

Prices F. O. B. cars 80 cent rate of Freight or Attica, New York.

Commission —

Cash Discount 2%

When to ship. As soon as possible.

Please acknowledge receipt of this Order by return mail.

Yours truly,

OWEN M. BRUNER CO.

OMB-GEB

Do not Stencil Your name or Advertisement on car."

(By Mr. MOISE.)

Q. After you sent the shipping instructions, which have been referred to in your last answer, what

(Deposition of Owen M. Bruner.)

was the next thing that you learned with respect to the delivery of lumber under the order?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant.

A. Mr. Ashenfelter called at my office during my absence leaving a telegram which was received from Menefee.

Q. Is that the telegram?

A. Yes, sir, this is the telegram.

Mr. MOISE.—I offer that telegram in evidence.

Mr. GRAHAM.—I object to the reception in evidence of that telegram on the ground that it is incompetent, immaterial and [67] irrelevant, and not within any of the issues made by the pleadings.

The telegram is marked Plaintiff's Exhibit No. 9, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 9.

“Received at 33 S. 10th St.

C 55PNC 29 Blue

YN Portland Ore 1112 AFDEC

19th 1919

W. C. Ashenfelter 205

Bldg Exchange Bldg Phila Pa.

Letter tenth we have cancelled Bruners order one one three eight five account cannot furnish and ship specified lengths nothing shipped on this order account unable to secure cars

O. R. MENEFEES CO.

335P”

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. Did Ashenfelter show you a letter which he received from the Menefee Company confirming the telegram just offered in evidence?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant. A. Yes, sir.

Mr. MOISE.—I offer that letter in evidence.

Mr. GRAHAM.—The same objection.

The letter is marked Plaintiff's Exhibit No. 10, June 29th, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 10.

“December 18, 1919.

(Stamp) B W P K

Owen M. Bruner Co., Phila.

Rec'd Dec 30 1919

Answered

Int ——— File ———

1 2 3 4

“Mr. W. C. Ashenfelter,
Builders' Exchange Bldg.,
Philadelphia, Pa.

“Dear Sir:

Herewith confirmation our wire this date. In reference [68] to Bruner order we are returning herewith his orders 11385 and 11385A as his orders did not conform to the way in which originally was accepted we cannot see our way clear to handle it as we could not load this material in specified lengths and widths “as you realize the market on

(Deposition of Owen M. Bruner.)

this stock is now ten dollars higher than what we quoted."

If he wishes prices on material similar to his order 11385-A we would be pleased to quote prices.

"Yours truly,

"O. R. MENEFEE COMPANY,

"BY _____."

OFT-ER

(By Mr. MOISE.)

Q. After the order for the 25 cars, which has been offered in evidence, was accepted, what, if anything, did you do in an effort to sell the lumber which you ordered from the Menefee Company?

Mr. GRAHAM.—That is objected to on the ground that it assumes a fact not proven, and on the further ground that the testimony sought to be elicited is incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings.

A. We made a diligent effort to sell the lumber, went to considerable time and expense of salesmen, thousands of letters, and by the use of various trade journals, advertising our purchase and what we had for sale.

Mr. GRAHAM.—I move to strike out that portion of the answer of the witness where he says he made a diligent effort to dispose of the lumber covered by this alleged order for the reason that it is a conclusion.

(By Mr. MOISE.)

Q. After Mr. Ashenfelter showed you the telegram from Menefee, wherein they cancelled the or-

(Deposition of Owen M. Bruner.)

der, which telegram has been offered in evidence, did you write any letters to Mr. Ashenfelter with respect to the matter? [69]

Mr. GRAHAM.—That is objected to on the ground that transactions between the witness and Ashenfelter are immaterial. A. Yes, sir.

Mr. MOISE.—I call for the original of letter dated 12-20-1919 from Owen M. Bruner Company to W. C. Ashenfelter.

(Original produced.)

(By Mr. MOISE.)

Q. I show you original letter dated 12-20-1919 from Owen M. Bruner Company to W. C. Ashenfelter and ask you if you sent that letter to W. C. Ashenfelter?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant.

A. I did.

Mr. MOISE.—I offer that letter in evidence.

Mr. GRAHAM.—It is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within any of the issues made by the pleadings.

The letter is marked Plaintiff's Exhibit No. 11, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 11.

“12-20-19. .

“(In pencil) Rec'd 12-30

“Mr. W. C. Ashenfelter,
Builders' Exchange,
Philadelphia, Pa.

Our Order #11385 11-25-19

“Dear Sir:

I regret that I was not in the office when you called yesterday. However, I have before me the telegram sent you by the O. R. Menefee Company, which reads as follows:

‘Letter tenth we have cancelled Bruner order one one three eight five account cannot furnish and ship specified lengths nothing shipped on this order account unable to secure cars’

The Menefees have no right to cancel this order without our consent. We did not consent to it, therefore, we expect them [70] to furnish it. If they want us to go out on the market and buy against their account, we shall do so, but the Menefee Company is too big and broad-minded to have this done.

In the latter portion of their telegram they say this order cannot be shipped on “account unable to secure cars.” There is no hurry for shipment. You have our order #11385-A, your order #123, to apply on our original purchase, order #11385. In accepting this order on the 15th inst., you omitted the “11” in naming our order number, same should be #11385-A. Now, this lumber for Hammonton

(Deposition of Owen M. Bruner.)

on this order can be shipped when they get cars because it is wanted for next spring's trade.

Therefore, the Menefee people need not feel that we are pushing them for shipment on this order because they are unable to secure cars at this time.

Please acknowledge receipt, and oblige.

“Yours very truly,

(In Pencil)

“OWEN M. BRUNER COMPANY.

“OWEN M. BRUNER.”

Referred to O. R. M. Co.

Ash 12-22-19

OMB-D

Mr. MOISE.—I call for the original of letter dated 1-20-20, from the plaintiff to Ashenfelter.

(Original not produced.)

Mr. MOISE.—I will offer this carbon copy of the original of 1-20-20.

(By Mr. MOISE.)

Q. Do you identify that letter? A. Yes, sir.

Q. What is it?

A. This is a letter dated January 20, 1920, concerning our order for 25 cars.

Q. Did you send that letter to Ashenfelter?

A. Yes, sir.

Mr. MOISE.—I now offer it in evidence.

Mr. GRAHAM.—I object to the receipt of that letter in [71] evidence on the ground that it is a self-serving declaration, that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings, and it is inadmissible.

Also for the further reason that the transactions between Ashenfelter and Bruner have nothing to do with the issues made by this action.

Plaintiff's Exhibit No. 12, June 29, 1922, T. R. P. reads as follows:

Plaintiff's Exhibit No. 12.

“1-20-20.

“Mr. W. C. Ashenfelter,
Stock Exchange Bldg.,
Philadelphia, Penna.

“Dear Sir:

In regard to our order #11385 for 25 cars of fir accepted by you for the O. R. Menefee Company, Portland, Oregon, which we believe is binding and which we do not see how either you or the Menefee Company can get out of furnishing, would advise that we will have to hold this order as binding.

My customers are now calling for the material which I have sold to them. I have known you for many years and you have always stuck by your bargains. You told me you were representing a reliable concern, in fact, O. R. Menefee Company wrote us we should take up all matters regarding prices with you, which we have done. Our customers want to know when they may expect invoices and we must give them an answer.

Furthermore, we have never declined to receive any material on this order which you say you had cut and ready for cars, but we did ask you to furnish us with a list of the specifications which you

(Deposition of Owen M. Bruner.)

have not done. You no doubt will recall that you told us Menefee had some of the material cut on this order and you had already ordered in cars.

I do not see how the Menefee Company can turn you down. I know we cannot stand for it, and furthermore, after we got together and accepted the order, you said to us, 'Well, Bruner, you made [72] a good buy.' You showed me your letters and telegrams accepting this order from your Company, the O. R. Menefee Company. I am sure that after they understand this matter right, they will know that they will have to fill this contract.

We are returning to you the original orders and the shipping instructions for the cars consigned to Hammonton and Attica. Let us know when you can commence and complete shipment. We have told our customers that your concern (Menefee) is good for all their contracts and they will get the lumber. We told them we were dealing with only good people and this is the only way we considered the purchase at the time, because their former shipments to us were always very satisfactory. Counting on a favorable reply that Menefee Company will ship the material, we are

Yours very truly,"

Mr. MOISE.—I call for the original letter from Bruner to Ashenfelter dated 1-31-1920.

(Original letter produced.)

(By Mr. MOISE.)

Q. I will ask you if you sent that letter to Mr. Ashenfelter?

(Deposition of Owen M. Bruner.)

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant. A. Yes, sir.

Mr. MOISE.—I offer that letter in evidence.

Mr. GRAHAM.—It is objected to on the same ground.

The letter is marked, Plaintiff's Exhibit No. 13, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 13.

“1-31-20

“W. C. Ashenfelter,
Builders' Exchange,
Philadelphia, Pa.

“Dear Sir:

We have a request under date of the 26th inst., [73] from the O. R. Menefee Company for balance of money due on three carloads of lumber. We are ready to settle for these 3 cars which they mention with the exception of one or possibly two cars on which there is an over-charge in freight rates for which we have not yet received our money, but what I particularly desire to state in this letter is—whether or not we shall hold this money and apply it against any extra prices we may have to pay on account of Menefee declining to ship our order for the 25 cars of lumber. I do not know that we can rightly withhold this money without due process of law but we dislike very much to consider any such action. What we want them to do is change face and say they will fill their accepted order for us.

“Yours very truly,

“OWEN M. BRUNER COMPANY.

(Deposition of Owen M. Bruner.)

(In pencil)

“OWEN M. BRUNER.”

Referred to O. R. M. Co.

W. C. A.

OMB—D 2-1-20

Mr. MOISE.—I call for the original letter from Bruner- to Allen-Murphy Lumber Company, successors to O. R. Menefee Company, dated September 3, 1920.

(Original letter produced.)

(By Mr. MOISE.)

Q. I will ask you if you sent that letter to the Allen-Murphy Lumber Company, successors to O. R. Menefee Company? A. I did.

Mr. MOISE.—I offer it in evidence.

Mr. GRAHAM.—Same objection.

The letter is marked Plaintiff's Exhibit No. 14, June 29, 1922, T. R. P., reading as follows:

Plaintiff's Exhibit No. 14.

“Order #11385

“September 3d, 1920.

“Allen-Murphy Lumber Company,

Successors to O. R. Menefee Company,

Portland, Oregon. [74]

“Gentlemen:

Replying to yours of the 27th ultimo in which you say you have a debit against us of \$2834.20.

(Deposition of Owen M. Bruner.)

While we have a counter-charge against you for a much larger amount for your nonfulfillment of our order for—

25 cars:

averaging 27,000' to a car

Totaling 675,000 ft.

at \$16.35

or

\$11,036.25

and we are awaiting your advice relative to same.

“Yours very truly,

“OWEN M. BRUNER COMPANY.

“OWEN M. BRUNER.”

OMB—EA

(By Mr. MOISE.)

Q. Referring to Plaintiff's Exhibit No. 12, you undertook to make some comment on a statement in that letter. What was it?

Mr. GRAHAM.—That is, certainly, objected to for the reason that the letter speaks for itself. The witness cannot add to, vary, contradict or modify its plain terms and provisions. It is also objected to on the further ground that it is irrelevant, incompetent and immaterial and not within any of the issues made by the pleadings in this action.

A. Mr. Ashenfelter called in our office after the acceptance of our order by him. I mean after his sale to us and our purchase of these 25 cars, and said he had some lumber to apply on the order. I asked him for the list, and I never received that list. What I want to know is, what

(Deposition of Owen M. Bruner.)

became of the cars which Menefee had cut on our purchase?

Mr. GRAHAM.—I move to strike out the answer of the witness on the ground that it is all incompetent, immaterial and irrelevant, and assumes facts not proved. We are not bound by any declarations made by Ashenfelter. [75]

(By Mr. MOISE.)

Q. Did Ashenfelter say the Menefee Company had cars already to be delivered, or had cut cars of lumber which were ready for delivery, on this order?

Mr. GRAHAM.—That is objected to on the ground that it is leading, and also on the ground that it is incompetent, irrelevant and immaterial, and not within the issues made by the pleadings.

A. Mr. Ashenfelter said he had some cars to apply on this order. I asked him for a list of those cars. I never received the list, and I never received notice of shipment, or anything about it.

Q. Cars of lumber cut by whom?

A. By Menefee on this purchase.

Q. I think you testified that you have been in the lumber business since about 1894?

A. Yes, sir.

Q. Have you bought and sold Douglas fir rough lumber before? A. Yes, sir.

Q. Is it in the line of your business to keep yourself posted as to the market values of lumber from time to time? A. Yes, sir.

Q. Do you do so? A. Yes, sir.

(Deposition of Owen M. Bruner.)

Q. How many years have you dealt in lumber, including Douglas Fir, shipped from the State of Oregon? A. When was the Seattle Exposition?

(By Mr. GRAHAM.)

Q. 1909.

A. I think 1909 was the first purchase we made.

(By Mr. MOISE.)

Q. Did you have any dealings in November and December 1919 in Douglas Fir including inquiries from persons who bought and sold that kind of lumber at that time? A. Yes, sir.

Q. As a result of your knowledge and experience in the lumber business, are you able to state the average market price of Douglas Fir lumber of the kind mentioned in the order which has been offered [76] in evidence in this case?

A. Yes, sir.

Q. What, in your opinion, was the market value of Douglas Fir lumber, rough, per 1000 feet, such as is specified in the order dated December 25, which has been offered in this case, and on December 19, 1919?

Mr. GRAHAM.—That is objected to on the ground that no sufficient foundation has been laid for the reception of the testimony sought to be elicited. Also on the further ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings.

A. \$64.35 per thousand feet delivered on the 78 rate of freight, which is the Philadelphia rate of freight, and \$64.85 per thousand feet delivered on

(Deposition of Owen M. Bruner.)

the 80 cent rate of freight, or the New York rate of freight.

Q. What is the average number of feet in a carload of Douglas Fir lumber shipped from the State of Oregon to points in or near Philadelphia and New York on the 78 rate to Philadelphia and on the 80 cent rate to New York?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant. Also on the ground that no sufficient foundation has been laid to show that the witness is competent to answer the question. A. 25,000 feet.

(By Mr. MOISE.)

Q. 25,000 feet in one carload?

A. In one carload.

Q. And for 25 carloads? A. 625,000 feet.

Q. What is the difference between the contract price in order dated November 25, 1919, and the market price on December 19, 1919, on 25 carloads?

Mr. GRAHAM.—That is objected to for the reason that it calls for a conclusion of the witness.

A. \$16.35 per thousand feet, making a total of \$10,218.75, which was [77] the difference in the market price at the time of the breach of the contract.

(By Mr. MOISE.)

Q. Did the Menefee Company, or anyone on its behalf, ever supply to you or offer to supply to you any of the 25 carloads of lumber which were

(Deposition of Owen M. Bruner.)

specified in the order which has been offered in evidence?

Mr. GRAHAM.—That is objected to on the ground that it assumes a fact not proven. Also on the further ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings. A. No, sir.

(By Mr. MOISE.)

Q. Have you made demand on the Menefee Company for the damages which you suffered by reason of the failure to receive such lumber?

A. We have.

Q. Have they paid same or any part thereof?

A. They have not.

Cross-examined.

(By Mr. GRAHAM.)

Q. You testified that you had some prior transactions with the Menefee Lumber Company, the defendant in this action. Is that a fact?

A. Yes, sir.

Q. By whom had those prior transactions been conducted? A. By Mr. Ashenfelter.

Q. Is it not a fact that in every instance the order had been sent to the Menefee Company for approval before being filled? A. No, sir.

Q. Would you say that it had not?

A. I am not prepared to answer that question without my other papers here. [78]

Q. In connection with this order which you

(Deposition of Owen M. Bruner.)

have testified about, all of your dealings were with Mr. Ashenfelter? A. Yes, sir.

Q. Is it not a fact that you made no claim from either Ashenfelter or the Menefee Company, the defendant in this action, until many months after the date of the alleged order? A. No, sir.

Q. Is it not a fact that the Menefee Lumber Company wrote you repeatedly for a balance owing on account of a purchase made theretofore by you from them? A. That is correct.

Q. Is it not a fact that until they had so written you, you had never made any written claim to either Ashenfelter or to them on account of any damages claimed by reason of the failure to fill this alleged order? A. No, sir.

Q. Will you produce, then, any written evidence of claims made by you to the Menefee Lumber Company prior to the date of September 3, 1920, the letter which is in evidence as Plaintiff's Exhibit No. 14?

A. We made our complaints to Ashenfelter and the letters have been offered in evidence. I think one of them was dated December 20, 1919, and the other January 20, 1920. Then there is another letter here, where they appeal for money, and I asked Ashenfelter what about paying that small balance of \$500, or thereabouts, for which they should have a credit, that I did not want to hold that money back unless I was within my legal rights.

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. Give us the date of that letter. What letter is it you are referring to?

A. January 31, 1920. There are three letters covering that question.

(By Mr. GRAHAM.)

Q. Then, if I understand you correctly, Plaintiff's Exhibits Nos. 12, 13 and 14 are the letters you wrote Mr. W. C. Ashenfelter and [79] the Allen-Murphy Lumber Company, successors to the Menefee Company, with reference to the matter of the claim you are now asserting? A. Correct.

Q. Prior to September 3, 1920, had you ever directly written to the defendant concerning any claim for damages by reason of the alleged failure to fill this alleged order?

A. I have no recollection of it.

Q. Is it not a fact that prior to the September 3, 1920, the defendant had sent you at least a dozen letters concerning a balance due on a shipment made in October or November 1919, or thereabouts, which letters had been unanswered until your letter of September 3, 1920, which is in evidence as Plaintiff's Exhibit No. 14?

A. That is probably correct.

Q. Isn't that correct?

A. Without the letters at hand, I will say yes.

Q. You recall that you received practically every month statements? A. Yes.

Q. And letters asking for your remittance?

A. I do not know about letters, but statements.

(Deposition of Owen M. Bruner.)

There were some letters, but I do not know that there were a dozen.

Mr. GRAHAM.—I ask that these seven letters be marked for identification as defendant's exhibits.

(Letters marked, Defendant's Exhibits for identification Nos. 1 to 7 inclusive.)

(By Mr. GRAHAM.)

Q. I hand you defendant Exhibits Nos. 1 to 7, inclusive, for identification, and ask you to produce the originals thereof if you have them.

Mr. MOISE—I think we have the originals.

(Originals produced.) [80]

(By Mr. GRAHAM.)

Q. Counsel has now produced the original letters, of which Defendant's Exhibits 1 to 7 inclusive for identification are copies, and I now ask you whether or not you received those original letters which I now hand you? A. Yes, sir.

Mr. GRAHAM.—I ask that these letters be received in evidence as Defendant's Exhibits.

Mr. MOISE.—The letters are objected to as incompetent and irrelevant.

It is stipulated between counsel for the respective parties that statements accompanied the letters which have just been offered in evidence.

The letters which have just been offered in evidence are marked respectively Defendant's Exhibits Nos. 15, 16, 17, 18, 19, 20 and 21, and reads as follows:

Defendant's Exhibit No. 15.

“February 27, 1920.

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Mar. 3, 1920

Answered ——

Int. —— File ——

1 2 3 4

“Owen M. Bruner Lumber Co.,
Philadelphia, Pa.

“Gentlemen:

On examination of your account we find that freight bills are standing out with you on the following cars:

30378

149154

870002

These cars were shipped to you way back in September and October and we would ask that you hurry them along to us as fast as possible as they are getting old and we would like to make final settlement with our mills on these cars.

“Yours truly,

“O. R. MENEFEE COMPANY,

“AL-JB.

“By A. L. Lendholm.” [81]

Defendant's Exhibit No. 16.

"March 19th, 1920.

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Mar. 24, 1920

Answered —

Int. — File —

1 2 3 4

"Owen M. Bruner Co.,
Colonial Trust Bldg.,
Philadelphia, Pa.

"Dear Sirs:

We shall be pleased if you will send us final settlement and freight bills for the three cars shipped in September and October 1919.

"Yours truly,

"O. R. MENEFEE COMPANY.

AL-E

"By A. L. Lendholm."

Defendant's Exhibit No. 17.

"April 21st, 1920.

"Owen M. Bruner Lumber Co.,
Colonial Trust Bldg.,
Philadelphia, Pa.

"Gentlemen:

Will you kindly send us freight bills covering

cars shipped you in September and October 1919,
at your earliest convenience.

“Yours truly,

“O. R. MENELEE COMPANY.

AL-F

“By A. L. Lendholm.”

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Apr. 26, 1920

Answered —

Int. — File —

1 2 3 4

Defendant's Exhibit No. 18.

“May 19th, 1920.

“Owen M. Bruner Company,

Philadelphia, Pa.

“Gentlemen: [82]

In checking over your account we find that
there are the following freight bills due on cars
as follows:

Car September 15th	30378
--------------------	-------

Car September 26th	149154
--------------------	--------

Car October 18th	870002
------------------	--------

We shall be pleased if you will mail this to us
as soon as possible.

“Yours truly,

“O. R. MENELEE COMPANY.

AL-F

“By A. L. Lendholm.”

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd May 24, 1920

Answered —

Int. — File —

1 2 3 4

Defendant's Exhibit No. 19.

"June 17th, 1920.

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Jun. 22, 1920

Answered —

Int. — File —

1 2 3 4

"Owen M. Bruner Company,
Philadelphia, Pa.

"Gentlemen:

We have repeatedly requested freight bills on cars Nos. 30378-149154 and 870002, shipped in September and October, 1919, with no result. Surely you must hold these freight bills by this time, and a small effort on your part in sending these would certainly help us out a great deal.

"Yours truly,

"ALLEN-MURPHY LUMBER COMPANY.

LEF-F

"By L. E. F."

Defendant's Exhibit No. 20.

“July 29th, 1920.

(Stamp)

B W P K

Owen M. Bruner Co., Phila.

Rec'd Aug. 4, 1920

Answered —

Int. — File —

1 2 3 4 [83]

“Owen M. Bruner Company,
Philadelphia, Pa.

“Gentlemen:

Quotations subject to change without notice. Agreements are contingent upon strikes, accidents and other delays unavoidable or beyond our control.

On reading over our last letter to you we cannot see any reason why we have not been favored with a letter at least upon such an urgent appeal to you explaining why we have not received freight bills on some cars shipped nearly a year ago.

Even though you do not hold these freight bills we are at a loss what to know since you do not even take the time to write us relatively. We ask you now for your letter. The cars in question are 30378, 149154 and 870002 shipped in September and October 1919.

May we expect the courtesy of a reply.

“Yours very truly,

“ALLEN-MURPHY LUMBER CO.

“LEF-F

“By L. E.”

(Deposition of Owen M. Bruner.)

Defendant's Exhibit No. 21.

“Aug. 27th, 1920.

(Stamp)

Owen M. Bruner Co., Phila.

Rec'd Sep. 1, 1920

Answered —

Int. — Filed —

1 2 3 4

“Owen M. Bruner Company,
Philadelphia, Pa.

“Gentlemen:

Your account has stood open with us for several months with a debit of \$2834.20. We have written repeatedly for money, but with not even the result of an answer, let alone cash. We would desire to know immediately, in order to let us know where we stand, what you intend to do regarding this in order that we may take proper action accordingly.

We trust that we may hear from you immediately.

“Yours truly,

“ALLEN-MURPHY LUMBER CO.

LEF-F

“By L. E.” [84]

(By Mr. GRAHAM.)

Q. I also ask you if, in addition to those letters which have been offered in evidence, drafts were not drawn on you and the matter finally placed in the hands of the Pacific Coast Shippers' Association who communicated with you repeatedly on this balance owing on a former purchase?

(Deposition of Owen M. Bruner.)

A. Yes, sir.

Q. How long have you been acquainted with Mr. W. C. Ashenfelter?

A. Fifteen or twenty years, I guess. Probably more. I don't know how long.

Q. Do you know his business in the city?

A. Yes, some of it.

Q. You have bought lumber from him many times?

A. I don't know how much I bought from Mr. Ashenfelter.

Q. Or through Ashenfelter?

A. Through Ashenfelter.

Q. Have you?

A. Sure. I bought this from him.

Q. But other orders?

A. No, I do not recall any.

Q. The relations between you and Mr. Ashenfelter are quite friendly, are they not?

A. Quite so.

Q. And it is a fact, is it not, that prior to the commencement of this action Mr. Ashenfelter furnished you a complete file of letters passing between him and the Menefee Company and you have had them at all times for your use?

A. You mean in our action?

Q. Yes. Prior to the time that this action was commenced in the Federal Court?

A. This file does not seem to be complete.

Q. He furnished you such letters as he had that

(Deposition of Owen M. Bruner.)

had passed between him and the Menefee Lumber Company. Isn't that the fact?

A. The letters I have here I got from Mr. Ashenfelter.

Q. And at the time you prepared a brief, prior to the time that this action was instituted in the United States District Court for Oregon, is it not a fact that Mr. Ashenfelter assisted you in the preparation of that brief? A. No, sir. [85]

Q. Isn't it a fact that Mr. Ashenfelter read the brief, and swore that it was a true and correct statement of facts?

A. That part, I believe, is correct. That is a matter of record, is it?

Q. When did Mr. Ashenfelter communicate to you the wire of December 19 which is in evidence as Plaintiff's Exhibit No. 9?

A. Oh, he called at my office and left it there and I found it next day when I returned to the office.

Q. I understood you to testify that a letter followed that wire. Did he also show you that letter that is, the letter under the same date as the wire, which is in evidence as Plaintiff's Exhibit No. 10?

A. He received this letter at his place on December 30. It bears our stamp mark on it.

Q. Then he communicated that letter to you also? A. Yes, sir.

Q. Up to that time had you sustained any loss on account of the failure to fill this alleged order?

A. Sure.

(Deposition of Owen M. Bruner.)

Q. Then what do you mean by saying in your letter to Mr. Ashenfelter, under date of January 31, 1920, that you are in doubt "whether or not we shall hold this money," that is, referring to the balance on the prior purchase, "and apply it against any extra price we may have to pay on account of Menefee declining to ship our order for the 25 cars of lumber."

A. Just what it states.

Q. Had you been compelled at that time to make any purchases at extra prices by reason of the failure of the Menefee Company to fulfill this alleged order?

A. That letter shows that there was a difference in the market price at the breach of the contract.

Q. But that does not quite answer my question. At the time that letter was written, had you made any purchases at prices greater than the prices specified in this order? A. Of the lumber?

Q. Yes.

A. Not on this order. I bought other lumber outside. Not on this order. I did not buy any against this order. [86]

Q. Then, you had not placed any orders for other lumber covered by this alleged order at prices greater than the price specified in the order?

A. No, I tried to replace this order and the prices ran 10, 15 and 20 per thousand more. In fact, I could not get definite quotations from any one on this schedule.

Mr. GRAHAM.—I ask that letter dated Decem-

(Deposition of Owen M. Bruner.)

ber 2, 1919, from the Menefee Company to Ashenfelter be marked for identification.

(Letter marked Defendant's Exhibit No. 8 for identification, T. R. P.)

Mr. GRAHAM.—I ask counsel to produce original of letter dated December 2, 1919, from the Menefee Company to Ashenfelter, if they have it.

(Original letter produced.)

Mr. GRAHAM.—Counsel has now produced the original of letter dated December 2, 1919, from the Menefee Company to Ashenfelter, a copy of which was marked for identification Defendant's Exhibit No. 8.

(The letter is now marked Defendant's Exhibit No. 22, June 29, 1922, T. R. P.)

(By Mr. GRAHAM.)

Q. I now hand you Defendant's Exhibit No. 22, and ask you if you have ever seen that letter before? A. Yes, sir.

Q. When did you first see it?

A. I do not recall.

Q. Would you say that it was not immediately upon its receipt in due course of mail from Portland, Oregon, to Philadelphia?

A. I don't know when I received that letter but when they flunked on their order I called Ashenfelter for his entire file.

Q. Referring now to Defendant's Exhibit No. 22, I will ask you if [87] it is not a fact that immediately upon its receipt in Philadelphia Mr.

(Deposition of Owen M. Bruner.)

Ashenfelter advised you of the contents of this letter?

A. The first I knew about this letter was when this telegram came in. The first I knew of it was when that letter came in of December 19. I did not know anything about it before.

Q. Then, do you mean to say that you had no information prior to December 19, the date this wire was sent, that the Menefee Company would not fulfill this order? Is that the fact?

A. I do not recall.

Q. Would you say that the contents of that letter were not communicated to you by Mr. Ashenfelter, the letter of December 2, 1919?

A. I do not recall now.

Q. Would you say that the contents were not communicated to you by Mr. Ashenfelter prior to December 19?

A. I have no recollection.

Q. Is it not a fact that supplemental orders, or suborders, as you called them, about which you have testified, were forwarded by you after the receipt of this letter of December 2, 1919, marked Defendant's Exhibit No. 22? A. Yes that is correct.

Q. And after you knew that the Menefee Company would not fulfill the order for specified widths and lengths? The question I had asked you was if it was not a fact that these suborders, which you have offered in evidence, were sent after the receipt of this letter of December 2, 1919, which is marked Defendant's Exhibit No. 22, and I followed that

(Deposition of Owen M. Bruner.)

question up with the question of whether or not at the time the suborders were sent in you knew that the Menefee Company were at least objecting to the fulfillment of this original alleged order on the ground that it was for specified widths and lengths rather than random widths and lengths? With that explanation on my part, will you answer the question?

A. What do you mean by "random widths and lengths"?

Q. With that explanation on my part, will you now tell me whether [88] or not the contents of Defendant's Exhibit No. 22 were communicated to you prior to the wire of December 19 which you hold in your hand, which is offered in evidence as Plaintiff's Exhibit No. 9?

A. I am not sure how to answer that question unless I refresh my memory on that.

Q. You at least secured this letter, which has been marked Defendant's Exhibit No. 22, from Mr. Ashenfelter after this controversy arose?

A. I have no recollection of that at all.

Q. You have a recollection of the wire which has been offered in evidence as Plaintiff's Exhibit No. 9? A. Yes.

Q. And you have a recollection of the letter which was written on the same date on which the wire was sent, which is in evidence as Plaintiff's Exhibit No. 10?

A. Yes. I answered this letter, didn't I?

Q. You have a recollection of that wire?

(Deposition of Owen M. Bruner.)

A. I have a recollection of the wire and I have a recollection of this.

Q. You do not appear to have a recollection of the letter which has been marked Defendant's Exhibit No. 22?

A. Not sufficiently to say yes to it.

Q. Not sufficiently to say whether its contents were or were not communicated to you?

A. No, sir.

Mr. GRAHAM.—I now offer in evidence Defendant's Exhibit No. 22. The witness has testified that there was a letter he has had in his possession, which he secured from Ashenfelter, which was written by the Menefee Company to Ashenfelter, and I think that the identification of it is, therefore, sufficient, and it becomes admissible evidence.

Mr. MOISE.—It is objected to on the ground that it is incompetent, irrelevant and immaterial to the issues in this case. [89]

Defendant's Exhibit No. 22 reads as follows:

Defendant's Exhibit No. 22.

“December 2, 1919.

“Mr. W. C. Ashenfelter,
Builders Exchange Bldg.
Philadelphia, Pa.

“Dear sir:

We are this morning in receipt of Bruner's order #11385, which is a blanket order with no shipping instructions.

This order is not in accordance with your letter of November 14th, on which we quoted. It was

(Deposition of Owen M. Bruner.)

our understanding from your letter that this order would be in accordance with our acknowledgment of the 24th, and we have four cars ordered for Philadelphia and will load accordingly.

The only way we can handle this order is random widths and lengths. We cannot ship specified widths and lengths in each car. We had a mill which was particularly anxious to saw and ship this stuff random widths and lengths for the same class of stock shipped in specified lengths we are receiving \$9.00 per thousand more. If we can get the cars we will have four or five cars on the road within the next few days. If this is not satisfactory, please advise immediately.

“Yours truly,

“O. R. MENEFEE COMPANY

“By_____.”

(In pencil)

Ans'd,

12-10-19

OFT-JB

Mr. GRAHAM.—In view of that objection, we will ask the witness Ashenfelter further questions concerning that letter.

(By Mr. GRAHAM.)

Q. You testified that you were familiar with the market price of the quality of lumber covered by this alleged order on or about December 19, 1919?

A. Yes, sir.

Q. Were you familiar with its market price on or about November 25, 1919? A. Yes, sir. [90]

Q. What was the difference between the market

(Deposition of Owen M. Bruner.)

price of this lumber on November 25, 1919 and December 19, 1919, or on or about December 19, 1919?

A. \$16.35 per thousand feet.

Q. Do you mean to say, then, that in less than 30 days, approximately, the market value of that class and character of lumber increased \$16.35 per thousand feet in Philadelphia, Pennsylvania?

A. Yes.

Q. And that is your testimony? A. Yes, sir.

Q. Then, you want to be understood as testifying that you bought that lumber from Mr. Ashenfelter at the prevailing market price on November 25, 1919? A. Correct.

Q. The orders which are in evidence I think speak for themselves, but they were all sent with pieces of specified widths and lengths, weren't they?

A. Yes. Specified; no, sir. What do you mean by "specified"?

Q. I call your attention to Plaintiff's Exhibits No. 7 and 8 and I ask you if it is not a fact that the suborders, as you have termed them, called for specified widths and lengths to be supplied by the Menefee Company?

A. This is a miscellaneous order.

Q. Will you answer my question yes or no, then make any explanation you please.

A. I will say "Yes" and "No." That is capable of two answers.

Q. All right. Let us hear your explanation.

A. It is a miscellaneous yard order. It did not call for exact number of pieces on the order.

(Deposition of Owen M. Bruner.)

Q. Do you mean to testify that when the order, referring to Plaintiff's Exhibit No. 7, specifies 50 pieces, 24 feet long, that that does not specify a specified width and a specified length?

A. It states the length and it states the width.

Q. You asked me a moment back to explain to you the difference between specified widths and lengths and random widths and lengths.

A. Yes, sir. [91]

Q. From your experience of many years of buying and selling lumber, don't you recognize a difference between specified widths and lengths and random widths and lengths?

A. That is a random order.

Q. Answer the question please. Don't you recognize a difference, from your experience in buying and selling lumber over a period of years, between an order for specified widths and lengths and an order for random widths and lengths?

A. Yes, if you mean by "specified" the exact number of pieces, ordered for a barn or for a factory or for a railroad construction where it has got to be exact and specific. This is not that kind of an order.

Q. But that does not answer my question. I was not asking you concerning a particular order. I was asking you generally, if you do not, from your experience of many years in buying and selling lumber, recognize a difference and a real distinction between an order for specified widths and lengths and an order for random widths and lengths?

(Deposition of Owen M. Bruner.)

A. I do. I will take that.

Q. Is it not a fact, too, that the market price for lumber shipped to specified widths and lengths is greater than the market price for lumber shipped to random widths and lengths?

A. On a single carload purchase, yes, maybe, but on a 25 carload purchase, wherein it runs from two inch plank, which we asked for, and which was confirmed by Ashenfelter, up to 12x12's, and including large sizes, we are within the scope of the order in furnishing you miscellaneous sizes, and that order may vary from 10 to 15 per cent, and I will leave it to you as a lumberman, or the West Coast Association. Those people attempted to bring a suit against us. Then you people jumped out from under the arbitration affair. Any one of them will call that a random yard [92] order and not for a specified contract. It is within the scope of the order.

Q. Continue your explanation. I am delighted to hear it, because I will say this to you, in all confidence, in line with the testimony of experienced lumbermen on the coast, that this order would never be considered an order for anything other than specified widths and lengths. Every lumberman on the coast will so testify.

Q. They wanted two-inch plank, and the original quotation or inquiry was for 3x6 and larger, and they asked of us two-inch plank. Didn't they?

Q. I am not on the witness-stand.

A. I say they did.

(Deposition of Owen M. Bruner.)

Q. You speak about original quotations. Did you see the original letter of November 14, 1919 which Mr. Ashenfelter sent to the Menefee Lumber Company?

A. I did not see that until sometime after the correspondence. I am trying to think when I did see that.

Q. Didn't that letter call for random widths and lengths?

A. No, sir, not random at all. I believe the first time "random" was mentioned was in this letter of December 2, I guess it was December 2, after the date of the acceptance of the order by their representative, by their Eastern Manager.

Mr. GRAHAM.—I will ask counsel to produce letter dated November 14, 1919 from Ashenfelter to defendant, or a copy of that letter. I have not the original with me.

(Copy of letter produced.)

Mr. GRAHAM.—I will say on record that we have made a very careful search and at the proper time we will prove it, to find the original of this letter.

(By Mr. GRAHAM.)

Q. I hand you copy of letter which is dated November 14, 1919, [93] which counsel for plaintiff has just handed me, and ask you if you have ever seen that letter before?

A. Yes, I have seen this before.

Q. Can you say just when you saw it before?

A. Sometime after they broke the contract.

(Deposition of Owen M. Bruner.)

Q. Did Mr. Ashenfelter show you that letter before this alleged order was placed with him?

A. You mean on November 25?

Q. Yes. A. I think not.

Q. Would you say he did not?

A. I would say he did not.

Q. And you identify this letter which you hold in your hand as one which Mr. Ashenfelter delivered to you, along with the other correspondence, passing between him and the Menefee Lumber Company?

A. Yes.

Q. So that we may be clear on this matter, will you say whether you saw this letter, which has been marked Defendant's Exhibit No. 23 prior to November 25, 1919, or after November 25, 1919?

A. I saw this afterwards.

Q. All right. That answers the question.

Q. You have got this random business on your mind.

Q. Wait a minute. That letter speaks for itself. They will ask you about that on redirect examination. Referring again to this balance, which defendant has set up in his answer, in the sum of \$551.32, do you admit that indebtedness to the defendant?

A. That is correct. They are entitled to a credit.

Defendant's Exhibit No. 23 is offered in evidence by counsel for defendant, and reads as follows:

(Deposition of Owen M. Bruner.)

Defendant's Exhibit No. 23.

“Nov. 14-19

(Million feet inquiry)

O. R. M. Co.,

Our good friend Bruner here says if you want some [94] business in #1 com Fir rough, and will make a price on such stuff as the following he will immedy place his order for same. You can ship 3 to 4 cars or more at a time of the following, 3x6" 8" 10" & 12" x 36 ft & under, and 4x6, 8" 10" & 12", 6x8, 8x8, 10x10 and 12x12 all lengths, up to 40 ft and under, #1 com rough, delivered at Philadelphia, and could ship at your convenience, and string the cars along, say 3 to 5 or 10 cars at a time, if you will make him a price of \$46.00 to \$47.00 per M ft. If so he will place an order for a million feet to be made up of the various sizes above stated & in few cars at a time. Could you do this, which would be a standing order to help us sandwich in between other orders from time to time. Will you kindly give this your best consideration, and please advise me promptly and oblige.

“Yours,

WCA-A

“W. C. ASHENFELTER.”

Redirect Examination.

(By Mr. MOISE.)

Q. Will you explain the difference between random widths and lengths and specified widths and lengths with respect to this order in this case?

A. I consider this order both random and mis-

(Deposition of Owen M. Bruner.)

cellaneous with limitations. This order was an order which was inclusive. That is, from my standpoint, it included anything that a mill could furnish. It was a very elastic order, and in that sense it is random, and the letter of Ashenfelter of November 14, 1919 says "3x6, 3x8, 3x10, 3x12x36 and under, and 4x6, 4x8, 4x10 and 4x12, and 6x8 and 8x8 and 10x10 and 12x12, all lengths, up to 40 ft and under, #1 common rough, delivered at Philadelphia, and could ship at your convenience, and string the cars along, say 3 to 5 or 10 cars at a time, if you will make him a price of \$46 to \$47 per thousand feet. If so, he will place an order for a million feet to be made up of the various [95] sizes above stated and in few cars at a time. Could you do this, which would be a standing order to help us sandwich in between other orders from time to time? Will you kindly give this your best consideration, and please advise me promptly and oblige." That is signed by Ashenfelter.

Our business is wholesalers. We are prepared to take anything the mill can furnish, and we have a good string of customers. We can take anything that a man can ship. This order was for 25 cars and was accepted by the eastern manager of Menefee, who was Ashenfelter. It called for 25 cars, and he accepted this order, signed for it, and it called for two inch stock, or 2x4, up to 12x12, and 12 x40 feet long. That is random enough and specific enough for any one. These two orders, one of Hamonton and one for Attica, came within the scope

(Deposition of Owen M. Bruner.)

of that purchase. These two orders were yard orders, not calling for exact quantities, because all manufacturers and all dealers know that a yard order is to fill in stock, to fill up the gaps, and can vary 10 or 15 per cent, and no one objects to that. It is a custom of the trade. There is not a size in either one of these orders that does not come inside of the 25 carload order, from 2x4 to 12x12. There is not a size in either the Hammonton order of December 13 or the Attica order of December 29, Plaintiff's Exhibits Nos. 7 and 8, which do not conform and come within the radius or scope of the original 25 carload order. Every bill we received on former shipments, on a similar order to this from the Menefee Company, included these sizes. We had a former order which called for I do not know how many pieces or carloads of similar sizes, and they shipped those within that scope, and they varied in those sizes, and that was a random order the same as this, even though it specified the number of pieces, because the order called for so much, and it is a custom of the trade, well established, that cars are put in transit, [96] and are sold. The former cars on the former purchase were in transit, and we got along so nicely on those orders, that this order was an outgrowth of that.

Mr. GRAHAM.—I move to strike out the testimony of the witness with respect to a custom of the trade. No such custom is pleaded. Any such testimony is purely inadmissible.

(Deposition of Owen M. Bruner.)

The WITNESS.—You were saying awhile ago that this order was worth more money than what you would call a specified order. I want to tell you that this entire 25 carload order was worth more than \$9 or \$10, which they admit it was worth. I believe that the entire order, at the time of the breach of this contract,—the difference in the market price,—at the place called for of delivery, must have been about \$16.35 difference in market price. (By Mr. MOISE.)

Q. You testified as to the market price of the lumber on December 19, 1919 at the time of the breach. You originally bought this lumber at what price?

A. At \$48 Philadelphia delivered on the 78 cent rate of freight and \$48.50 delivered on the 80 cent rate of freight, which is the New York rate.

Q. You consider that you made a good buy, don't you? A. I do.

Q. Was it above or below the market price at that time?

A. That was the market price at that time between Ashenfelter and ourselves.

Q. What do you mean by that, the market price at that time between Ashenfelter and yourselves?

A. Well, other quotations were made at the same time by other people. I had similar quotations at the same time.

Q. What was the condition of the lumber market on November 25, when this order was placed?

Mr. GRAHAM.—That is objected to on the ground that it[97] is incompetent, immaterial and irrel-

(Deposition of Owen M. Bruner.)

evant, and not within any of the issues made in these pleadings.

(By Mr. MOISE.)

Q. Answer the question.

A. I think I paid the full market price at the time I bought the 25 cars. 25 cars is not a small purchase. It is a block order. It is a bulk order. I paid a good price. I could not tell whether the market was going to go down or up, but it was a good buy, I believe. I was anxious to do more business with these people.

Q. Counsel for defense has asked you why you did not pay the balance of the \$551 which you admitted to be due to the Menefee Company. What was your sole reason for not paying the balance?

A. Because they are indebted to us for a greater sum.

Q. You were asked on several occasions by counsel for the defendant when you first saw the correspondence which passed between Mr. W. C. Ashenfelter and the Menefee Company. I now ask you whether Mr. Ashenfelter showed you this correspondence prior to December 19, 1919? A. No, sir.

Q. What, if anything, occurred between Mr. Ashenfelter and yourself with respect to the increasing price of this lumber after you first gave him the order for it?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant.

Mr. MOISE.—I will withdraw that question.

(Deposition of Owen M. Bruner.)

(By Mr. MOISE.)

Q. What did you understand was the original price per thousand at which you bought this lumber from Ashenfelter? A. \$48 and \$48.50.

Q. Wasn't there some mistake about the price?

A. There was a mistake about the price. We corrected the mistake. I sent down \$46 and \$46.50. He immediately called me and said I [98] had made the price \$2 less, and I corrected it. That was the correction made in accordance with our understanding, which was \$48 and \$48.50. He wrote me and he brought me to task in a letter there.

Recross-examination.

(By Mr. GRAHAM.)

Q. In your redirect examination you had occasion to testify at length concerning defendant's Exhibit No. 23, being a letter dated November 14, 1919 from Ashenfelter to the Menefee Company. In that letter I call your attention to the fact that it says: "Our good friend Bruner here says if you want some business in #1 common fir rough, and will make a price on such stuff, he will immediately place his order for same"?

I will ask you, therefore, if prior to November 14 Ashenfelter and you had discussed this order which was placed November 21 or November 25?

A. I think not.

Q. What, then, is meant by this expression or statement in Defendant's Exhibit No. 23, being a letter from Ashenfelter to Menefee, that:

(Deposition of Owen M. Bruner.)

“Our good friend Bruner here says if you want some business in #1 common fir rough, and will make a price on such stuff, he will immediately place his order for same”?

Isn't it a fact that you and he had discussed this matter, and that was the occasion of this letter of November 14 being written?

A. That part is correct. He came into my office and asked me for some business, because they had shipped some lumber, three cars, which they asked for freight bills on, which I did not have in hand. That is one reason they did not get their freight bills back in some of these statements. He wrote me several letters. You will find some of my answers. I did not have the [99] freight bills because of some mistakes in the freight bills. He came in and solicited this business. Good salesman like he is, he boosted the price up on me and told me what a good buy it would be, and I came to his solicitation. I told him, “All right. We will get together.” This was the result.

Q. That was all prior to November 14?

A. It may have been. It might have been a day ahead. It may have been the same day.

(By agreement between counsel for the respective parties, the signature of the witness is waived.)

Deposition of W. C. Ashenfelter, for Plaintiff.

W. C. ASHENFELTER, having been duly sworn, was examined and testified as follows:

(By Mr. MOISE.)

Q. What is your full name?

(Deposition of W. C. Ashenfelter.)

A. W. C. Ashenfelter.

Q. What is your business?

A. Sales Agent. Manufacturers' representative.

Q. Have you had any dealings with the plaintiff and defendant corporation in this case?

A. Yes, sir.

Q. Do you recall meeting an officer of O. R. Menefee Company in the early spring of 1918?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, irrelevant and immaterial. A. Yes.

(By Mr. MOISE.)

Q. What was his name?

A. O. R. Menefee and Judge Ellis.

Q. What position did O. R. Menefee hold in the Menefee Company?

A. He was president of the company.

Q. Were you employed by O. R. Menefee?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant, and not within the issues made in the pleadings. [100]

A. Yes, sir. I was Eastern Representative.

(By Mr. MOISE.)

Q. Eastern Representative?

A. Yes, sir, or Eastern Manager.

Q. Of what company?

A. O. R. Menefee Company.

Q. How long did you occupy that position?

Mr. GRAHAM.—The same objection.

A. About two years, or more.

(Deposition of W. C. Ashenfelter.)

Q. What, if any, conversation did you have with O. R. Menefee, President of the O. R. Menefee Company, with respect to printing cards and stationery with your name on them?

Mr. GRAHAM.—The same objection.

(By Mr. MOISE.)

Q. What did he say and what did you do?

A. Mr. Menefee asked me to represent him here in the East as his Sales Agent and as Manager and told me to get cards and envelopes printed and to send the bill to him, which I did, and which he remitted to the printers here.

Q. I show you Plaintiff's Exhibit No. 3. Is that one of the cards you had printed at the request of Mr. Menefee?

Mr. GRAHAM.—The same objection.

A. Yes, sir.

(By Mr. MOISE.)

Q. I show you two envelopes on which appear "W. C. Ashenfelter, Eastern Manager."

A. Yes, sir.

Q. Who had those envelopes printed?

Mr. GRAHAM.—The same objection.

A. I had them printed at Mr. Menefee's request.
(By Mr. MOISE.)

Q. And who paid for the printing?

Mr. GRAHAM.—The same objection.

A. Mr. Menefee. [101]

(By Mr. MOISE.)

Q. Did you send envelopes of this character to the O. R. Menefee Company?

(Deposition of W. C. Ashenfelter.)

Mr. GRAHAM.—The same objection.

A. Always. Always did so, from the time they were printed.

Mr. MOISE.—I offer them in evidence.

Mr. GRAHAM.—They are objected to as incompetent, irrelevant and immaterial, and not within the issues made by the pleadings in this action.

(The two envelopes just offered in evidence are marked respectively Plaintiff's Exhibits Nos. 24 and 25.)

Plaintiff's Exhibit No. 24 reads as follows:

Plaintiff's Exhibit No. 24.

“Return in 5 Days to

W. C. Ashenfelter

Builders' Exchange, Philadelphia,

Eastern Manager,

O. R. Menefee Company.”

Plaintiff's Exhibit No. 25 reads as follows:

Plaintiff's Exhibit No. 25.

“Return in 5 Days to

W. C. Ashenfelter,

Builders' Exchange, Philadelphia,

Eastern Manager,

O. R. Menefee Company,

O. R. MENEFEES COMPANY,

1400 YEON BUILDING,

PORTLAND, OREGON.”

(By Mr. MOISE.)

Q. What were your duties which you performed for the Menefee Company?

(Deposition of W. C. Ashenfelter.)

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings, and if it be an attempt to prove agency, it cannot be proved in this manner.

(By Mr. MOISE.) [102]

Q. What did you do?

A. Sold lumber for them and took orders and adjusted accounts, where necessary.

Q. How many transactions did you have for the Menefee Company?

Mr. GRAHAM.—The same objection.

A. Quite a lot.

(By Mr. MOISE.)

Q. Tell us the number and amount.

Mr. GRAHAM.—The same objection.

A. Well I cannot say offhand. Probably 50 orders, more or less.

(By Mr. MOISE.)

Q. Covering how many million feet of lumber?

Mr. GRAHAM.—The same objection.

A. Probably several million.

(By Mr. MOISE.)

Q. Over what states did you sell lumber for the Menefee Company?

Mr. GRAHAM.—The same objection.

A. I agreed with Mr. Menefee to have the territory from New York to Richmond, Virginia.

(By Mr. MOISE.)

Q. Did you get that territory?

Mr. GRAHAM.—The same objection.

(Deposition of W. C. Ashenfelter.)

A. Yes, sir.

(By Mr. MOISE.)

Q. Now tell about the manner in which you conducted this business. How did you go about it?

Mr. GRAHAM.—The same objection.

A. I took such orders as I could secure for him. I did not sell common lumber for anybody else, nor represent any other mill or connection on the Pacific Coast in common lumber but Menefee.

Now, you cannot say there is a fixed price for fir [103] material in this market for the reason that fir is not in universal use in this particular section, and while I sold a great many orders, there were times that I would write or wire Menefee for a lower price, or if I could not get the price that I tried to get, and had an offer on a lower price, I frequently would wire him to see if it would be acceptable to him.

Q. In this particular order which we are discussing in this case, did you take this matter up with O. R. Menefee before you sold the 25 cars to Bruner?

Mr. GRAHAM.—The same objection.

A. Yes, sir.

(By Mr. MOISE.)

Q. I show you copy of letter marked and offered in evidence as Defendant's Exhibit No. 23 and ask you if that is a copy of a letter which you sent to the Menefee Company on November 14, 1919?

A. Yes, sir.

(Deposition of W. C. Ashenfelter.)

Q. With respect to the order for 25 cars which has been offered in evidence in this case?

A. Yes, sir.

Q. Did you receive a reply to that letter?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made in the pleadings.

A. Yes, I received a reply to that letter.

(By Mr. MOISE.)

Q. I show you a telegram from the Menefee Company to Ashenfelter dated November 20, 1919, and ask you if that is the reply?

A. Yes, that is the reply.

Mr. MOISE.—I offer that telegram in evidence as Plaintiff's Exhibit.

(Same objection.) [104]

The telegram is marked Plaintiff's Exhibit No. 26, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 26.

“1919 Nov 20 P M 10 30

B486CH 33 NITE

Portland Org 20

W C Ashenfelter X 398

Builders' Exch Bldg Philadelphia Pa

Can handle twenty cars Bruner rough timbers forty-seven dollars net to us must know immediately if this offer accepted this is low price and you should be able to add your commission.

O R MENEFEE CO.

(In pencil) Ans'd 11-21-19 A”

(Deposition of W. C. Ashenfelter.)

Mr. MOISE.—I call for the original telegram from Ashenfelter to the Menefee Company dated November 21, 1919.

Mr. GRAHAM.—I do not appear to have the original wire in my files.

(Original not produced.)

Mr. MOISE.—I will offer in evidence copy of telegram addressed to O. R. Menefee Company, dated November 21, 1919, signed W. C. Ashenfelter.

(By Mr. MOISE.)

Q. And I will ask you if you sent that telegram to the Menefee Company?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings.

A. Yes, sir. That is right. I sent that.

Mr. MOISE.—I offer that telegram in evidence.

Mr. GRAHAM.—It is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings.

The telegram is marked Plaintiff's Exhibit No. 27, [105] June 29, 1922, T. R. P., and reads as follows:

(Deposition of W. C. Ashenfelter.)

Plaintiff's Exhibit No. 27.

“Philada. Nov. 21st-19.
(Stamp) B W P K
Owen M. Bruner Co., Phila.
Rec'd Nov. 25, 1919
Answered —
Int. — File —
1 2 3 4

To O. R. Menefee Company. Street and No.
#1400 Yeon Bldg. Place Portland Ore.,

Answering your telegram twentieth that forty eight dollare Philada is best you can do for Bruner, but can only take twenty-five cars and for immediate acceptance. Bruner accepts, enter his order for twenty-five cars at forty eight dollars Philada rate specifications to follow.

W. C. ASHENFELTER

(In ink)

Confirmation

Copy to Bruner

W. C. A.

11-22-19”

(By Mr. MOISE.)

Q. I show you a letter dated November 24, 1919, signed by the O. R. Menefee Company addressed to you and ask you if you received that letter?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant.

A. Yes.

Mr. MOISE.—I offer that letter in evidence.

(Deposition of W. C. Ashenfelter.)

Mr. GRAHAM.—The same objection.

The letter is marked Plaintiff's Exhibit No. 28, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 28.

“November 2, 1919.

“Mr. W. C. Ashenfelter,
Builders Exchange Building,
Philadelphia, Pa.

“Dear Sir:

We are in receipt of your wire of the 21st, instructing [106] us to enter Bruner order for twenty-five cars 3x6 to 3x12, 4x6 to 4x12 and 6x8, 8x8 and 10x10 and 12x12, 40 foot and under at \$48.00 delivered Philadelphia.

The mill has some of this stock on hand and is ordering the first car this morning. Please advise if Bruner will accept any stock larger than 12x12 also can he use any 2" stock.

“Yours truly,

“O. R. MENEFEE COMPANY

OFT-JB

“By _____.”

(In pencil)

Ans'd 12-4-19

(By Mr. MOISE.)

Q. Had you made sales of lumber for the Menefee Company to the Bruner Company before this transaction here in suit?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and

(Deposition of W. C. Ashenfelter.)

irrevelant, and not within the issues made by the pleadings.

A. Yes, sir.

(By Mr. MOISE.)

Q. Did you ever notify Bruner in any manner that any contracts for the sale of lumber which you might make for the Menefee Company had to first be ratified by the Company before agreement would be binding?

Mr. GRAHAM.—That is objected to for the same reasons, and I make the further objection that the question is leading, and that agency cannot be proved in the manner attempted.

A. No, sir.

(By Mr. MOISE.)

Q. The answer filed in this case the defendants state that you were nothing but a lumber broker. Was that the capacity in which the Menefee Company employed you?

Mr. GRAHAM.—I object to this question for the [107] same reason stated to the preceding question.

A. No, sir. I was his exclusive representative in this territory.

(By Mr. MOISE.)

Q. In the answer which is filed, in the fourth paragraph, it is alleged by the defendant that you were the agent of and represented the plaintiff, the Bruner Company. Is that so?

Mr. GRAHAM.—The same objection.

A. No, sir.

(Deposition of W. C. Ashenfelter.)

(By Mr. MOISE.)

Q. Did you act in any transaction between the plaintiff and defendant in this case on behalf of the plaintiff, the Bruner Company?

Mr. GRAHAM.—Objected to on the same grounds.

A. No, sir.

(By Mr. MOISE.)

Q. For whom were you acting?

Mr. GRAHAM.—The same objection. It is incompetent, immaterial and irrelevant, and not within the issues made in the pleadings.

A. For the Menefee Company.

(By Mr. MOISE.)

Q. Did you ever receive any compensation of any kind from the Bruner Company for acting as their agent?

Mr. GRAHAM.—The same objection.

A. No, sir, not a thing. I treated him the same as any other customer.

(By Mr. MOISE.)

Q. At one time you did show the Bruner Company some of the correspondence which passed between you and the Menefee Company, didn't you? A. Yes.

Q. When did you do that?

A. Well, I don't just remember when it was. It was when Bruner told me that he had been to a great [108] deal of expense and loss and he would hold Menefee responsible for not filling that order, and he asked me to let him see such

(Deposition of W. C. Ashenfelter.)

correspondence as I had because he was going to insist on Menefee filling his order.

Q. When you took this order and sent it on to the Menefee Company, did you expect the Menefee Company to fill the order? A. Absolutely.

Q. And what was the first notice you had that the Menefee Company was not going to fill the order?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings.

A. I had a letter from them stating that it was specified lengths and widths and was not within their understanding of what they expected to receive.

(By Mr. MOISE.)

Q. Is that the letter to which you refer (referring to Defendant's Exhibit No. 22, dated December 2, 1919, from Menefee to Ashenfelter)?

A. No, what I am referring to was the other letter. This letter was received after Bruner gave me the original order.

(By Mr. GRAHAM.)

Q. By "this letter," you are testifying now relating to letter marked Defendant's Exhibit No. 22, dated December 2, 1919, from Menefee to Ashenfelter?

A. Yes. Isn't there a telegram there? I can't remember these dates.

(Deposition of W. C. Ashenfelter.)

(By Mr. MOISE.)

Q. (Telegram marked Plaintiff's Exhibit No. 9 shown witness.) Is that the telegram?

A. No, that is not the one. This letter is dated December 2 (referring to Defendant's Exhibit No. 22). It was before December 2.

Q. Before December 2? A. Yes. [109]

Q. A telegram to whom?

A. Didn't they wire that they would not accept the order? This may have been the first intimation I had. I cannot say about that positively because I cannot remember. This may have been the first word I received from them, that they would not accept the order (referring to Defendant's Exhibit No. 22, being letter dated December 2, 1919, from Menefee to Ashenfelter).

Q. What was the first notice you had that Menefee was not going to fill the order?

A. As near as I can recall, this letter was the first (referring to Defendant's Exhibit No. 22, being letter dated December 2, 1919, from Menefee to Ashenfelter). I thought may be they wired me, but I guess they did not. I guess this letter was the first.

Q. In this letter, Plaintiff's Exhibit 1, the Menefee Company says: "For your information, we have the best salesman in the United States, located in Philadelphia, Mr. W. C. Ashenfelter, Builders' Exchange Building. In the future you will please take any matters pertaining to prices

(Deposition of W. C. Ashenfelter.)

up with him, and you will get quicker results than if you wrote here."

Did Bruner show you that letter?

A. Yes, he showed me that letter.

Q. Did the Menefee Company send you a copy of it?

A. Yes, they sent me a carbon copy of it. I cannot remember exactly whether Bruner showed me that letter, but he told me he had got the letter. He might have showed it to me. I do not remember exactly, but he told me he had got the letter, and I think he showed it to me.

Q. Didn't the Menefee Company send you a copy of it?

A. Yes, sir. I got a copy before he told me anyhow some way or other. I don't remember just how. [110]

Q. In the sales of lumber which you made for the Menefee Company wasn't the custom between yourself and the company that before you could make a sale you had to get their approval of your sale?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant. No custom is pleaded, and it is not a proper manner in which to prove the alleged agency. Also that it is not within the issues made by the pleadings.

(By Mr. MOISE.)

Q. Answer my question.

A. No, sir. Absolutely not.

(Deposition of W. C. Ashenfelter.)

Q. State the method of dealing between you and the home office with respect to the sales you made?

Mr. GRAHAM.—The same objection.

A. I took orders for him right along, except if anything special came up, where I had secured an order below the market price, you might say, or below the prices that were quoted by others, in that case I would frequently wire or write the Menefee Company, if they would lower their price, because they had mills of their own that were cutting there and they bought lumber from others, and they frequently had stuff that they could buy up at a low price, and they would frequently make me a price that was way under anybody's else price, because they could buy it cheap and ship it, and so when I got an offer that was really below what I knew was a low price, sometimes I would ask them if they would accept it, and other times, if it was not very much below the price, I would take it and Menefee always accepted it. I never had any other order rejected that I can remember.

Q. In the two years you represented the Menefee Company of all the orders you took for them, which you have testified ran into [111] several million feet, is this the only one which they refused to fulfill?

Mr. GRAHAM.—The same objection.

A. This is the only order that I can recall on which there was any rejection or trouble or a dispute over.

(Deposition of W. C. Ashenfelter.)

Cross-examined.

(By Mr. GRAHAM.)

Q. Were you on a regular salary from the Menefee Lumber Company?

A. I was on a commission. That is practically the same thing as a salary.

Q. In other words, you received a commission on each order that was accepted?

A. No, I received a commission on every order that I took except this Bruner order.

Q. Then you are interested in this Bruner order to the extent of your commission on it? Is that the fact?

A. I was interested in it to get the business for Menefee and also to get my commission.

Q. What commission were you to receive?

A. I will tell you. When I first started with Menefee he gave me 50 cents a thousand feet, and I sent him some business. Then when Mr. Menefee came on here he said that he was so well pleased with the business, and he said, "I never allow anybody to ask me for more money. I am going to give you so much more commission," which was pretty near double, if I remember right. He said that he would allow me \$1 a thousand on any price that was \$20 or over at the mill, and 75 cents a thousand on anything that was under \$20, f. o. b. cars on the Coast.

Q. On this order, then, if it had been filled, what would have been your commission, approximately?

A. \$1 a thousand feet.

(Deposition of W. C. Ashenfelter.)

Q. And how many thousand feet of this character of lumber would be in 25 cars?

A. I should say roughly between 500 and 600 thousand. [112—113]

Q. Then you were interested in this matter in a commission to the extent of \$500 or \$600?

A. I was interested in it that much, yes. I was interested in whatever that commission amounted to—partially interested in it.

Q. Before this alleged letter was placed, as a matter of fact you took the matter up with Mr. Bruner? A. I took what?

Q. Took the matter up with Mr. Bruner, before ever any order was sent to the Menefee Lumber Company, had not you taken the matter up with Mr. Bruner?

A. I solicited the business from Bruner.

Q. And after you solicited Bruner, what did you do then? For the purpose of refreshing your memory, I call your attention to letter under date of November 14, which is in evidence as Defendant's Exhibit No. 23?

A. Yes. I wrote this letter to Menefee and asked if he could make a price on about one million feet at \$46 and \$47 per thousand feet.

Q. Hadn't you discussed the matter with Bruner before you wrote the letter?

A. I discussed with him what price I could get and what price he could pay.

Q. And in this particular transaction you first took up the matter of the price with Menefee

(Deposition of W. C. Ashenfelter.)

before you made the price to Bruner. Is that the fact?

A. No, absolutely, no. Bruner gave me an idea of about what he would pay for one million feet.

Q. I understood you to testify that it was not your habit to receive confirmation of orders from Menefee, but it is a fact that before you placed your alleged order you wrote under date of November 14 to the Menefee Company? A. Yes.

Q. And it is a fact, also, that you wired the price that Bruner offered subsequent to that letter of November 14, is it not? A. Yes.

Q. Before you took the order? A. Yes, sir.

Q. Your wire being in evidence as a Plaintiff's Exhibit under [114] date of November 21. Is that the fact? A. Yes, sir.

Q. From the testimony it appears that you received a corrected order covering these 25 carloads dated November 25. What did you do with that order?

A. No, I don't think I have that order here. I forget whether Bruner sent it to me. I think he did send me the order. You mean the one that had \$46 in it?

Q. That was corrected, was it not?

A. I sent it back to him and told him that was a mistake, that the price was \$48.

Q. And you received the corrected order, which is in evidence, Plaintiff's Exhibit 6, which I now hand you?

A. I do not think I sent that order out. I would

(Deposition of W. C. Ashenfelter.)

not take that order. I would not take the order because the price was wrong.

Q. This is the corrected order.

A. I do not think I sent the other one out because I would not take it. Menefee told me the price that I was to get, and I got that price, and when Bruner did not give me that price I sent it back to him.

Q. Just as soon as you forwarded that order on you received in due course of mail a reply from the Menefee Company, did you not, which has been offered in evidence here as Defendant's Exhibit No. 22? A. Yes.

Q. What did you do when you received that letter under date of December 2d?

A. I wrote and told him I was at a loss to understand his letter, that Bruner's order took in random widths and lengths, and he said "specified widths and lengths," and I asked him to explain to me what he meant by "specified," because it is not specified when there is a variety of widths and a variety of lengths, and I could not understand what he meant by saying specified. [115]

Q. On November 25, 1919, you secured this corrected order in which the price was correctly fixed from Bruner? A. Yes.

Q. Covering 25 carloads, which is a large order? A. Yes.

Q. Now, on December 2d, in due course of mail,

(Deposition of W. C. Ashenfelter.)

you received this letter which said they could not accept it? A. Yes.

Q. Did you immediately convey the contents of that letter to Mr. Bruner?

A. No, I do not think I did. Not right away.

Q. Do you mean to say that, after Bruner had placed that large order, and after you had received the information from Menefee that they would not fill it, you did not call that to the attention of Bruner?

A. No, not right away, because I wrote to Menefee, in answer to his letter, asking him to explain to me what he meant by saying "random widths and lengths," when I was giving him random widths and lengths, and I did not intend to say anything to Bruner until I got his explanation.

Q. Whatever his explanation was, he said he would not fill it. That is what he told you in the letter of December 2. Isn't that the fact?

A. Yes, that is correct.

Q. And you again wrote that Bruner was planning to place this order out among his trade and his customers, did you not?

A. I did not know exactly what he intended to do.

Q. You did not know what he planned?

A. No.

Q. Do you want us to understand that you said nothing to Bruner about his letter?

A. I do not think so. I do not think I said anything to him until I found out from them that

(Deposition of W. C. Ashenfelter.)

they would not or were not going to fill the order. If I remember correctly he came back at me and he said they had some cars, about two or four, I forget which, loading, and "Will Bruner accept those?" I told him yes, he will take those. Bruner said he would accept them. Then I still hoped and expected that they would fill the rest of the order. [116]

Q. You wrote that letter to him under date of November 14 upon which he sent you the wire of November 20th, didn't you? A. Yes, sir.

Q. You also received from the Menefee Company a wire under date of December 18 or 19, didn't you? A. The 18th or 19th?

Q. Stating absolutely, right in line with the letter of December 2, that the order would not be filled? A. Yes.

Q. I refer particularly to plaintiff's offered Exhibit No. 9 (telegram). You showed that wire to Bruner at once upon its receipt, didn't you?

A. I don't remember about that. I would not say that, when I showed it to him, because I always kept hoping that they would fill the order, that they would be able to buy the stuff and fill the order.

Q. If I understood Mr. Bruner's testimony correctly, he said that you left the wire immediately at his office on its receipt. If you left the wire there at his office, didn't you leave this letter of December 2, or advise him of it?

(Deposition of W. C. Ashenfelter.)

A. I did not say anything to Bruner about it until I was sure in my mind that they would not take it. Whether I left this there at the time or not I would not say at all because I cannot remember.

Q. I hand you Plaintiff's Exhibit No. 14 and ask you what date that letter was received?

A. I think I took the order down to him.

Q. And you also showed him this letter of December 18, did you?

A. I don't remember whether I showed it to them or not.

Q. When did you turn all of your file over in this matter to Mr. Bruner?

A. That I cannot remember. Bruner asked me for some letters or telegrams out of my file, to proceed with this matter, and I gave him some, but just when it was I really cannot remember at all.

Q. I ask you whether, in connection with this matter, you did not receive letters from the Menefee Company under date of December 23, [117] 1919, December 30, 1919, and February 2, 1920, copies of which I hand you, and the originals of which I request the counsel to produce.

(Originals produced.)

A. Yes.

Mr. MOISE.—They are objected to as incompetent, irrelevant and immaterial.

(By Mr. GRAHAM.)

Q. I hand you letters which have just been pro-

(Deposition of W. C. Ashenfelter.)

duced by counsel for the plaintiff dated respectively December 23, 1919, February 2, 1920, and December 30, 1919, and ask you whether you received these letters, in due course of mail, from the Menefee Company? A. Yes, sir.

Mr. GRAHAM.—I ask that they be received in evidence as Defendant's Exhibits.

Mr. MOISE.—They are objected to as incompetent, irrelevant and immaterial.

The letters just offered in evidence, are marked respectively Defendant's Exhibits Nos. 29, 30 and 31, and read as follows:

Defendant's Exhibit No. 29.

“December 23, 1919.

“Mr. W. C. Ashenfelter,
Builders Exchange Bldg.,
Philadelphia, Pa.

“Dear Sir:

We are returning herewith your order 123 as we returned the original order several days ago account order did not conform to our original quotation and acknowledgment of the order.

“Yours truly,

“O. R. MENEFEE COMPANY.

“By _____.”

(In pencil)

Ans'd

12-29

OFT-JB

Defendant's Exhibit No. 30.

“December 20, 1919.

“Mr. W. C. Ashenfelder,
Builders Exchange Bldg.,
Philadelphia, Pa.

“Dear Sir: [118]

Referring to Bruner's order of the 20th, received this morning. Your letter of November 14th, reads in part as follows:

‘You can ship 3 to 4 cars more at a time, of the following, 3x6", 8", 10" and 12" x 36 ft. and under, and 4x6", 8", 10" and 12", 6x8, 8x8, 10x10, and 12x12 all lengths, up to 40 ft. and under, #1 com., rough, delivered at Philadelphia, and could ship at your convenience, and string the cars along, say three to five or ten cars at a time.’

We wired you on November 20th, that we could handle an order on this basis and you wired us on the 21st, accepting same, we acknowledged same to you on the 24th. You will note that your request and our reply to you was for sizes shown and all lengths to be up to 40 foot. You evidently did not accept the order in this manner from Bruner as he gave you a blanket order with shipping instructions to be supplied, which is not in accordance with your letter to us.

We have never accepted this order from Bruner

(Deposition of W. C. Ashenfelter.)

and under the circumstances can not now accept it.

“Yours truly,

“O. R. MENEFEЕ COMPANY.

OFT-JB

“By _____.”

(In pencil)

Ans'd 1-5-20 Ash.

Defendant's Exhibit No. 31.

“February 2, 1920.

“Mr. W. C. Ashenfelter,

Builders Exchange Bldg.,

Philadelphia, Pa.

“Dear Sir:

We are returning herewith letter addressed to you by Owen M. Bruner Company, and also the order which you enclosed with same. As we have written you before we told you we would accept an order for random lengths and widths and were in a position at that time to take the order had we received one in accordance with our wire to you, instead you sent us a couple of orders for specified [118½] lengths and widths.

It appears to us that you agreed to let Bruner give you specified orders.

“Yours truly,

“O. R. MENEFEЕ COMPANY.

OFT-JB

“By _____.”

(By Mr. GRAHAM.)

Q. At the same time that you say you were representing the Menefee Company in this city and in

(Deposition of W. C. Ashenfelter.)

this territory, you were also representing other lumber companies?

A. No, no companies at all for rough or common lumber.

Q. You were representing companies here?

A. That sold mill work.

Q. Companies that sold mill work? A. Yes.

Q. Companies on the coast also that sold mill work? A. Yes.

Q. Then the Menefee Company was not the only company you were representing?

A. Yes, the Menefee Company was absolutely the only Company I represented to sell rough lumber for.

Q. But you were representing, regardless of character—

A. Mill work is an entirely different thing.

Q. You were representing mill work companies?

A. Yes, sir.

Q. Several of them? A. No. One.

Q. Is it not a fact that your business for the past several years has been the representative of different lumber companies in the nature of a broker? A. No, sir. I am not a broker.

Q. You are not?

A. No, sir; I am not a broker. A broker is one who buys lumber on his own account and sells it on his own account.

Q. Are you a salesman for lumber companies?

A. Yes.

(Deposition of W. C. Ashenfelter.)

Q. Isn't that the capacity in which you were acting for the Menefee Company?

A. Absolutely.

Q. And in no other capacity, either, were you?
[119] A. Salesman for them, yes.

Q. You did not own any stock in the Menefee Company, did you? A. No, sir.

Q. You did not have any management or direction of its affairs, did you? A. No, sir.

Q. Nothing beyond getting business in this territory?

A. But I took a great deal of interest for Mr. Menefee because I liked him very much. I tried to do all I could for him, for his own personal interest. I had no other object outside of my own commission, which was natural, but many times I would go out of my way to get business when I lost money really or to do a favor for Menefee because he wanted the business.

Q. You liked him so well that, without any authority being given by him, you turned over all your file of letters which passed between you concerning this alleged order. Isn't that the fact?

A. No, I did not turn them all over. I only turned over such stuff as he asked me for.

Q. As who asked you for? A. Mr. Bruner.

Q. Did you have the consent of Mr. Menefee to do that? Did you take it up with him?

A. No, sir; Mr. Menefee was dead.

Q. Or with any officer of the Allen-Murphy Com-

(Deposition of W. C. Ashenfelter.)

pany, successors to Menefee, to turn over private correspondence between you and the Company?

A. No, sir.

Q. You simply did it on your own account?

A. Yes, sir.

Q. What interest, if any, do you have in the outcome of this litigation?

A. Not a solitary thing. I am just out my time and everything else. All I am doing is that I am testifying to the facts and the truth in the matter so far as I know them and I am capable of.

Q. Before ever this instant action was instituted, is it not a fact [120] that you turned over all of these letters and swore to their truth?

A. I did not turn them all over.

Q. These particular letters which are offered in evidence, and swore to the truth of a brief that had been put in by counsel for the plaintiff?

A. What is the brief?

Q. Were there so many briefs that you have not knowledge of the brief you verified that was put in? Did you sign so many briefs that you do not remember? Did you sign more than one brief?

A. I do not think so.

Q. Did you sign any brief for them?

A. What do you mean by a brief?

Q. Any document.

Mr. MOISE.—I think, in fairness to the witness, if you want to ask him if he swore to a paper, you ought to show him the paper, so that he will know what you are talking about. Show him the thing

(Deposition of W. C. Ashenfelter.)

that he signed, then he will know what you are asking him about.

Mr. GRAHAM.—It is the affidavit sworn to before Mr. Matlock here.

(By Mr. GRAHAM.)

Q. Now that counsel has refreshed your memory, can you say then that you were duly sworn and said you had read the foregoing brief of argument, which you said earlier in your testimony you did not know what it was denominated and stated that the facts therein stated were true in every particular, and you subscribed to the truthfulness of the same?

A. If I read this over and signed it, that is what I did.

Q. Didn't you read it over before you signed it and swore to it for them? A. I guess I did.

Q. Don't you know?

A. No, I can't recall reading it all over.

Q. You did swear that it was truthful and correct and your acknowledgment [121] was taken before Mr. Matlock in this office. Isn't that correct? A. Yes, sir.

Q. And yet you want us to understand that you have not any interest in this controversy?

A. Not a bit. I have not taken any orders from Mr. Bruner in any way that had anything like compensation for anything for this and I have known Mr. Bruner for a long time.

Q. You want us to understand that you are not

(Deposition of W. C. Ashenfelter.)

receiving any compensation directly or indirectly in this matter?

A. Absolutely not a thing. I would not take it if it was offered.

Q. You heard Mr. Bruner's testimony as to the price named in this order which is in evidence as the market price for lumber of that character on or about November 25, 1919. Would you testify too, that that was the prevailing market price of lumber of that character at that time?

A. No, sir. The price was below the market price in that order.

Redirect Examination.

(By Mr. MOISE.)

Q. I think you testified in this transaction that you represented the Menefee Lumber Company and not Bruner? A. Yes, sir.

Q. That is absolutely true, is it not?

Mr. GRAHAM.—That is objected to as incompetent, immaterial and irrelevant.

A. Yes, sir.

(By Mr. MOISE.)

Q. There have been some letters offered in evidence by the defendant, and you wrote replies to the Menefee Company upon the receipt of those letters, didn't you? A. Yes, sir.

Q. I show you copy of letter dated January 10, 1920, to Menefee and ask you if you sent the original of which that is a copy to them? [122]

Mr. GRAHAM.—That is objected to as incom-

(Deposition of W. C. Ashenfelter.)

petent, immaterial and irrelevant and not within the issues made by the pleadings. A. Yes, sir.

Mr. MOISE.—I call for the original of letter dated January 10, 1920, from Ashenfelter to Menefee.

(Original produced.)

Mr. MOISE.—I offer in evidence the original letter.

Mr. GRAHAM.—It is objected to on the ground that it is incompetent, immaterial and irrelevant, and not within the issues made by the pleadings, and not proper redirect examination.

The letter is marked Plaintiff's Exhibit No. 32, June 29, 1922, T. R. P., and reads as follows:

Plaintiff's Exhibit No. 32.

“Philada.

~~Portland, Oregon,~~ Jany. 10th -20.

“O. R. M. Co.,

I have your favor of the 5th inst., and I am at a loss to understand what you mean, when you say that the Bruner orders do not conform in any particular with your quotation to me. Will you please explain to me what you mean, and if his specifications are not in accordance with the plain understanding of your acceptance of that order I will endeavor to have him change same, as he is not unreasonable, and is entitled to know what you mean by not conforming with your quotations.

The order read which you accepted for 25 cars, for 2x4 to 12x12x10 to 40 ft long #1 Com. fir and

(Deposition of W. C. Ashenfelter.)

he has endeavored to be within those specifications, and if he has not, then please say just what you want, but it was on that proposition that you accepted the order, and you cannot cancel that order promiscuously just because prices have advanced, especially as Bruner has sold this material already to his trade, and they will insist upon his filling his [123] orders, which he will have to do, but if there is any way that he can arrange his specifications so as to meet your convenience in any way, I am sure he will try to meet you half way, but as for your just cancelling that order, you are in the wrong as you conclusively accepted the same both by wire, and by letter, and if I am wrong in any way I am now waiting to have the matter explained where I am in the wrong, but so far none of your letters have attempted to show me where I am in the wrong, and I was absolutely under obligation to take that order after you accepted it, and awaiting your prompt reply,

“Yours truly,

WCA-A

“W. C. ASHENFELTER.”

(By Mr. MOISE.)

Q. Counsel asked you if you had read over this brief in which Mr. Bruner's claim against the Menefee Lumber Company was set forth, and if you made the affidavit to it, in which you said that you had carefully read over the foregoing brief of argument on behalf of the Bruner Company against the Menefee Lumber Company, and find that the facts therein stated are true and correct

(Deposition of W. C. Ashenfelter.)

in every particular and hereby subscribe to the truthfulness and correctness of the same. You made such an affidavit as that, didn't you?

A. Yes, sir.

Q. And you read that brief over? A. Yes, sir.

Q. Why did you make an affidavit that that was a true and correct statement of the facts of the case? A. Because he stated the facts in it.

Q. In other words, because the facts stated in that brief were true and correct. Is that correct?

Mr. GRAHAM.—That is objected to on the ground that it is leading. [124]

Mr. MOISE.—I will withdraw that question.

(By Mr. MOISE.)

Q. In this letter dated January 10, 1920 (Plaintiff's Exhibit No. 32), which has been offered in evidence, it appears that this stationery is the stationery of the Menefee Company of Portland, Oregon. Where did you get that stationery from?

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, irrelevant and immaterial and not within the issues made in the pleadings.

A. Ferris & Company, Philadelphia.

(By Mr. MOISE.)

Q. And who ordered it printed?

Mr. GRAHAM.—The same objection.

A. O. R. Menefee.

(By Mr. MOISE.)

Q. He ordered it printed? A. Yes, sir.

Q. And how did it get into your possession?

(Deposition of W. C. Ashenfelter.)

Mr. GRAHAM.—The same objection.

A. He told me to order it and use it and have the company send him the bill and he would pay us.

Q. You will observe that that letter-head has on it "Portland, Oregon."

A. Menefee sent me letter-heads. Menefee sent me his letter-heads on white paper, and also this yellow paper for copies, but in office correspondence I saved the white letter-heads and used these yellow ones. He sent me two or three packages by express.

Q. Counsel for the defendant has asked you why it was that you turned over some of the correspondence to Bruner which passed between you and the Menefee Company. I now ask you when you did turn over such correspondence to Bruner and why? [125]

Mr. GRAHAM.—That is objected to on the ground that it is incompetent, immaterial and irrelevant, and not proper redirect examination.

A. I will tell you why.

(By Mr. MOISE.)

Q. When, first. Then, why.

A. I do not remember exactly when I turned it over to them but it was some time after they definitely said they would not fill the order. The reason I turned it over to them was this, that my first interest was for the Menefee Company. My next interest was to protect that contract I took in good faith and they accepted it in good faith,

(Deposition of W. C. Ashenfelter.)

and when he came back and said "random widths and lengths," when they say "specified," they have got to get that out of their heads. When they say "Specified," and then put in several widths and several lengths, you have to say specified in random widths and lengths. You can't say specified and leave out in random widths and lengths, because that is wrong. Then after all that he asked for a broad, blanket order, and came back and said that was not what he wanted. I could not understand his understanding. I wrote him. I said, "I want you to know, for my own satisfaction. It gives you a leeway. It is random widths and lengths absolutely." On the other hand, I told him further that if he shipped more or less of any widths or lengths in any car or more or less cars that Bruner would accept it. Now he accepted that order, and he put me in a bad place, as well as dishonoring himself, and he used the excuse to say that he did not understand the order because it was not random widths and lengths. It was absolutely random widths and lengths. If you say "specified" you must say "specified in random widths and lengths," which it was.

The reason I turned those things over to Bruner was [126] simply as a matter of honor. That is all. He was in honor bound to take that order for that price, that he had the right to fill it, and Bruner would collect if he did not fill it.

(Deposition of W. C. Ashenfelter.)

Q. Didn't he tell you to add your commission to the original price of the lumber?

Mr. GRAHAM.—That is objected to as not proper redirect examination.

A. Yes, in the telegram.

(By Mr. MOISE.)

Q. Did you increase the price of the lumber so as to include your commission?

A. Yes; he told me \$47. My commission was \$1. I made the price to Bruner \$48.

Mr. GRAHAM.—I make the same objection to that question and answer.

(By Mr. MOISE.)

Q. So that, if this order had been fulfilled, as a matter of fact, at Menefee's request, he would have been freed from paying the commission, and you would have collected it from Bruner, would you not, from the increased price of the lumber?

Mr. GRAHAM.—The same objection.

A. I would have been entitled to it, I suppose.

(By Mr. MOISE.)

Q. Did you tell Bruner anything about that?

Mr. GRAHAM.—The same objection.

A. No, sir. The reason I submitted the price to Menefee was because it was below the market going price \$7 or \$8.

Q. \$7 or \$8 below the market price?

A. Below the market price, the going price, yes.

Q. That was the reason you submitted it to Menefee?

A. Yes, to see if he would accept it. [127]

(Deposition of W. C. Ashenfelter.)

Q. Had you got Menefee's permission to accept it?

A. He accepted it, and then the market advanced very rapidly right after that, to \$7, \$8 and \$10 more within perhaps 30 days.

Recross-examination.

(By Mr. GRAHAM.)

Q. I have a very few more questions to ask you. As a matter of fact, then, Mr. Bruner is in error when he says the price quoted was the prevailing market price at the time the order was taken?

A. Mr. Bruner was closer in touch with the market conditions than I was because he was dealing exclusively in lumber, but as near as I know the general market prices of lumber. I know from other sales that it was way below that going price.

Q. In your opinion, it was from \$7 to \$8 below the prevailing market for that character of lumber at the time the order was taken? A. Yes.

Q. And 30 days from that date lumber had gone up so that there was that vast difference in the 30 day period?

A. I would say that, taking the \$7 or \$8 below, it advanced at least \$8 or \$9 above the market price, which would bring it around \$15, \$17 or \$18. If he had to go out and buy lumber at that time he would have probably had to pay around \$15 or \$18.

Q. All within a period of 30 days during November?

A. Yes, sir; because at that time there was a temporary abnormal condition, probably brought on on account of the war, but there was a temporary ab-

(Deposition of W. C. Ashenfelter.)

normal condition. There was no real steady market.

Q. You have given at some length the reasons why, without the consent of Menefee or any of the Menefee people, you turned over all of this private correspondence to Bruner.

A. I did not turn it all over.

Q. That which has been offered in evidence relating to this alleged contract? [128] A. Yes, sir.

Q. You turned that all over, didn't you?

A. Yes.

Q. Do you know when?

A. I turned it over when he requested me to.

Q. Do you want to be understood as saying that the order which you forwarded was strictly in accordance with the preliminary inquiries you made under date of November 14?

A. I would not say strictly but in a general sense it was, absolutely.

Q. With reference to this stationery, and these cards, I understand you to testify that your dealings were all with Mr. Menefee? A. Yes, sir.

Q. Did you have any dealings with any other officers than Menefee?

A. In regard to printing?

Q. Yes.

A. No. Well, yes; I think they wrote me that they were sending me some letter-heads.

Q. What other officer did you have dealings with than Menefee?

A. It was always signed by the Menefee Company.

(Deposition of W. C. Ashenfelter.)

Q. Mr. Menefee is dead now, is he not?

A. Yes, sir.

(By agreement between counsel for the respective parties, the signature of the witness is waived.)

[129]

In the District Court of the United States for the
District of Oregon.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEES LUMBER CO., a Corporation,
Known as ALLEN-MURPHY COMPANY,
a Corporation,

Defendant.

Portland, Oregon, November 16, 1922.

JOHN M. BOYLE, Tacoma, Washington, Attorney
for Plaintiff. SIDNEY GRAHAM, Attorney
for Defendant.

Before R. S. BEAN, District Judge.

J. E. MANLEY5

J. P. KEATING18

Plaintiff rests21

H. B. VAN DUSEN22

Defendant rests24

[130]

Mr. BOYLE.—I offer in evidence the depositions
of Mr. Bruner and Mr. Ashenfelter, taken on behalf
of the plaintiff.

Mr. GRAHAM.—We think the moment this is attempted to be introduced in this matter, on this deposition of the president of the plaintiff company and of the agent there is such a showing made as to entitle this defendant to a directed verdict. Now, without urging the particular objections of that kind and to make the record satisfactory, will counsel state the effect of the depositions and then let the entire testimony direct and cross-examination go in.

COURT.—What is the objection?

Mr. GRAHAM.—Our first objection, may it please the Court, is that the contract is one with Ashenfelter, a sales contract; it is direct with him.

COURT.—That, I assume, goes to the merits of the case.

Mr. GRAHAM.—That goes to the merits and is also a variance; they have pled a contract with us and have set out *in haec verba* an order addressed to Ashenfelter, and the courts in many states have held that when an instrument is set out *in haec verba* it concludes the record and the instrument speaks for itself. We have authorities that when an instrument is directed to a man without designation, even though he does sign with the designation “Agent” the contract is a contract with the agent and not with the principal.

Secondly. That the depositions of Bruner and Ashenfelter will show that the entire matter originated with a letter of inquiry of November 14, 1919 by Ashenfelter to us in which he invited quotations for Bruner on random widths and lengths. Quota-

tions were made on that basis and the orders came for specified [131] widths and lengths; the offer and acceptance are in opposition, one to the other, so there was never a contract. The depositions themselves will show that Bruner was advised of this situation.

Third. And, regardless of the fact of either of these two points, the thing we think is absolutely conclusive, the order itself which they will offer in evidence contains this remarkable provision—I don't want to make a statement and I will simply say this in passing—when the depositions are read I am sure the court will have the same impression I had when I attended—there was a very close relation between the alleged agent and Bruner—very good personal friends, and everything was done—to use plain terms—in order to stick the lumber company here in Portland, and in carrying out his little plan, this order will show they went too far and this covers a vital legal objection to the validity of the sales contract.

COURT.—Your objection now goes to the merits?

Mr. GRAHAM.—And also to the admission of the testimony.

COURT.—Let the depositions be offered and make your objection on the final argument of the case.

Mr. GRAHAM.—I want to say this final thing: Referring to the order which is the alleged contract, it says: “To be shipped in sizes and lengths as wanted. We shall immediately begin a campaign for orders and will send same to you as soon as

we book the business.” In other words the contract lacked mutuality. If prices went down, no orders would be booked; if prices went up they would book orders. This was a wholesale lumber merchant supplying retail yards, and the courts are unanimous in holding such orders void.

Mr. BOYLE.—The depositions show that some time last year the plaintiff had some dealings and correspondence with the [132] defendant Menefee Lumber Company and had purchased some lumber, and some of the transaction was hardly completed at that time, and at that time they received an intimation and a letter from the Menefee Lumber Company stating that in the future they should take up with Mr. Ashenfelter all matter of prices; that they had the best agent in the United States right there in Philadelphia, for them to deal with him, and thereupon the plaintiff, pursuant to that, entered into negotiations with this agent, who, the depositions show, was appointed and supplied at the defendant's cost, with stationery, with letter-heads holding himself out as the eastern agent for the Menefee Lumber Company, and relying upon the letter of instructions telling them to go to this agent who would make prices—that he was the best agent in the United States and knowing that he held himself out as that; the depositions show that they actually supplied him and paid for the printing of the stationery for the Menefee Company by Ashenfelter, eastern agent; the depositions will show that they entered into this agreement and that he signed this agreement as the agent and

that the prices were agreed upon and that when they sent in to Mr. Ashenfelter, the agent of the defendant, the order he said that there was a mistake in the order of two dollars per thousand, that it ought to be two dollars a thousand more; they said they agreed that was a clerical mistake in the making out of the order and sent a corrected order a day or two afterwards.

Mr. BOYLE.—We submit the two depositions for the Court's perusal, without reading them.

COURT.—With the understanding can be read.

Mr. GRAHAM.—Subject to the objections contained in the depositions and the objections that they show variance and the contract is void for want of mutuality. [133]

Mr. BOYLE.—We have a couple of witnesses whose testimony is directed to the quantity of lumber contained in the twenty-five cars, for it may be a little indefinite as to what the capacity of these cars might be, and while the deposition of one witness states what the capacity of these cars might be, and while the deposition of one witness states what the capacity would be we want to further establish that to show what the amount of this breach would be, and then we will have further witnesses in regard to prices. [134]

The testimony of the witnesses examined orally at the trial is as follows:

Testimony of J. E. Manley, for Plaintiff.

J. E. MANLEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOYLE.)

Mr. Manley, where do you reside?

A. Tacoma, Washington.

Q. How long have you resided there?

A. Since 1903.

Q. What business are you engaged in?

A. Lumber manufacturing and selling.

Q. How long have you been engaged in that business? A. Since I came there in 1903.

Q. Will you state to the Court to what extent you are engaged in manufacturing and dealing in lumber?

A. At the present time we have a sawmill of approximately 100,000 feet per day outfit at Fairfax, Washington.

Q. Are you an officer of the company?

A. I am secretary of the company.

Q. What is the name of your company?

A. Manley-Moore Lumber Company.

Q. How long have you been operating that plant?

A. Been operating a mill since 1907; operating this mill since 1910.

Q. What is the extent of your operations there?

A. We have approximately 100,000 feet per day output.

(Testimony of J. E. Manley.)

Q. Are you connected with any other manufacturing establishment?

A. Interested with the Washington Manufacturing Company.

Q. What is their business?

A. That is manufacturing mill work and finishing lumber and porch material.

Q. Where do you market your lumber?

A. Throughout the United States and to some extent in foreign countries. [135]

Q. Do you have charge, direct charge yourself of the sales of lumber?

A. I have charge of the sales of the Manley-Moore Lumber Company.

Q. Did you have charge or were you acting in this same capacity in the year 1919? A. I was.

Q. You were acquainted then with the market value of lumber in November and December 1919.

A. I was.

Q. I show you, Mr. Manley, an order that is referred to in part of the deposition that is before the Court, and ask you to examine that. Mr. Manley, can you tell the Court what if any difference there was in the market price of lumber as described in that order on the 25th of November, 1919, and the 19th day of December of the same year.

Mr. GRAHAM.—I object on the ground that it is incompetent, immaterial and irrelevant, not dealing with the issues of this proceeding, but in order to expedite matters and save repeating this objection—I think I have outlined the theory on which we are

(Testimony of J. E. Manley.)

proceeding—and it can be understood that these general objections are made; we will not renew them.

COURT.—This goes to the question of damages, assuming there is a contract, I understand?

Mr. GRAHAM.—Yes.

Q. You may state, Mr. Manley.

A. This order specified rough lumber, 2x4, 2x12; I would consider the difference in value as of these two dates,—the market was advancing rapidly at that time—would be about six dollars per thousand.

Q. What would you say then in reference to the order itself, that is before you, at the prices stated in that order; what would you say was the difference in the value, market value and the prices therein quoted?

A. I would like to be explicit in this on account—

Q. You explain to the court. [136]

A. —of the matter that was brought up here. This order reads twenty-five cars 2x4 to 2x12—12 to 40 feet, and price \$48.50, delivered at eighty cent rate, which seems to be \$22.00 at the mill. That is my opinion of the market price at the time if there were nothing further on the order, but the order further specified “to be shipped in sizes and lengths as wanted.” That changes it. If the order was given with that provision I would think would be considerable under the market if placed at \$22.00. I would think it would be at least six dollars under the market. A great many would not make such an order at all.

(Testimony of J. E. Manley.)

Q. Then, Mr. Manley, let me ask you what then would be the difference between the price in that order and the market value on the 19th of December?

A. This order as specified with that provision there, giving the buyer the privilege of specifying at a later date and specifying certain sizes, I would consider this at least twelve dollars under the market a month after it was taken. This was December?

Q. December 19th? A. Yes.

Q. Do you think would be a difference then of twelve dollars?

A. Yes, I would like to explain this on account of that proviso there that has been mentioned heretofore.

Q. That it gives the—

A. Gives the purchaser the privilege of specifying the exact lengths at some future time.

Q. Then, Mr. Manley, would this in your opinion be considered an order, specific order, or a random length order?

A. Taking this whole order I would consider it a specific order absolutely.

Q. That means specific as to the—

A. Lengths and sizes.

Q. It wouldn't then be a random length order?

[137]

A. No, not in my opinion.

Q. Now, will you state to the Court what in your opinion is the capacity of a carload of lumber such

(Testimony of J. E. Manley.)

as you describe here, that is the cars generally used in shipping from the coast to eastern points, as indicated there?

A. Well, rough lumber of this description will load all the way from 18,500 to 30,000 feet to a car. 18,500 would be practically the minimum because you have to get fifty thousand pounds on a car. I would consider an average loading would run about 22,000.

Q. About 22,000?

A. About 22,000. You will get some even larger than 30,000; probably they will run from twenty-one to thirty thousand.

Q. Now, Mr. Manley, I presume it may be clear to lumber men; it isn't to me and may not be to the Court. What is meant in that order, that eighty cent rate New York and fifty cent rate Philadelphia, or whatever it says there?

A. It reads here: "Price delivered on a New York or eighty cent rate." The rate at that time on lumber from Pacific Coast Terminal points to New York was eighty cents per hundred pounds. A thousand feet of lumber is estimated at 3300 pounds, which would make the rate offered in dollars and cents to New York approximately \$26.40. And this seventy-eight cent rate, that is the rate to Philadelphia at that time; that means seventy-eight cents per hundred pounds, and figuring 3300 pounds to a thousand feet of lumber.

Q. I take it from that order that the rate specified

(Testimony of J. E. Manley.)

and the price specified was to be the price of the lumber with the freight added?

A. Cost at the mill including freight to New York or Philadelphia.

Cross-examination.

(Questions by Mr. GRAHAM.)

I will call your attention to defendant's [138] Exhibit 23, which is a letter written under date of November 14, 1919, written by one Ashenfelter to the defendant company, and ask you to read that letter if you will.

A. Shall I read this aloud?

Q. No, just read it to yourself.

Mr. BOYLE.—I think, if the Court please, this is not cross-examination. We didn't ask him about that at all.

Mr. GRAHAM.—May it please the Court, they have asked him his construction of this order. They have gone into the difference between an order for specified widths and random widths and lengths. The question I want now is first to direct his attention to this letter with which the transaction originated, then I will ask if the letter to which they directed his attention is not in accordance with the letter of inquiry, and that is information the Court should have.

Mr. BOYLE.—That is not proper cross-examination.

COURT.—Not strictly cross-examination, but I suppose he just as well testify now on that subject as later.

(Testimony of J. E. Manley.)

Mr. GRAHAM.—Yes, as it is before the Court without a jury. A. I can read the letter?

Q. Yes, if you wish.

A. I can understand it better if I do. This is a letter, I presume it is from Ashenfelter, to the Menefee Company which says: “Our good friend Bruner here says if you want some business in number one common fir rough, and will make a price on such stuff as the following will immediately place his order for same. You can ship three to four cars or more at a time of the following, 3x6” 8”, 10” and 12” x 36 feet and under and 4x6”, 8”, 10” and 12” 6x8, 8x8, 10x10 and 12x12 all lengths up to forty feet and under, number one common rough, delivered at Philadelphia and could ship at your convenience [139] and string the cars along, say three or five or ten cars at a time; if you will make a price of \$46.00 to \$47.00 per thousand feet. If so he will place an order for a million feet to be made up of the various sizes above stated and in a few cars at a time. Could you do this, which would be a standing order to help us sandwich in between other orders from time to time? Will you kindly give this your best consideration, and please advise me promptly, and oblige.”

Q. Now, counsel for plaintiff has directed your attention to the alleged order which was offered in evidence as Plaintiff’s Exhibit 6, and I will ask you if that order is in accordance with that inquiry?

(Testimony of J. E. Manley.)

Mr. BOYLE.—Object as immaterial and irrelevant because this correspondence is between Ashenfelter and the Menefee Lumber Company and it is immaterial if the contract binds the agent—we have established agency; if it is binding it is immaterial, and therefore I object on that ground.

Mr. GRAHAM.—If the Court please, if the plaintiff were advised of the letter it is material certainly.

COURT.—He can answer, and what value it has I suppose is a question for the court.

A. Well, this letter here starts in to outline what I would call a random order, with the exception where he says, “If so he will place an order for a million feet to be made up of the various sizes above stated and in a few cars at a time.” Now, it appears to me that he has gone the limit in sending the order with no specifications attached and no idea what they will be, and retains the privilege there of specifying sizes and lengths as wanted.

Q. These will perhaps aid you in the matter. I hand you plaintiff’s Exhibit 7, which was a suborder sent under that blanket order of November 25th, and ask if you will say that was in accordance with [140] that letter of November 14th, which is in evidence as Plaintiff’s Exhibit 23?

Mr. BOYLE.—Object to that as incompetent, irrelevant and immaterial.

A. Well, the only ground in the original correspondence—in this letter that would give him the privilege of specifying an order like that, he has 24, 32 and 28 foot lengths only—his sentence is

(Testimony of J. E. Manley.)

just right where he speaks "to be made up of various sizes above stated and in a few cars at a time." There he intimates that he would specify what each car was to contain, but at first blush you would evidently take that for a random order to load anything you want from the mill.

Q. Mr. Manley from your experience of a number of years as a lumber man, would you say that blanket order which is in evidence as Plaintiff's Exhibit No. 6, and the specifications of the suborder sent under that, which is in evidence as Plaintiff's Exhibit 7, are in accordance with that inquiry; taking the letter of November 14th as a whole, and the customs and practice in the lumber industry—the customs and practice that prevail in the lumber industry. You can answer that yes or no and make any explanation you wish.

A. Will you repeat that?

Q. (Read.)

A. Should I answer what I would do if I got a letter like that?

A. You can first answer yes or no and then make your explanation.

Mr. BOYLE.—If it can be answered by yes or no; if not state why and what your ideas are.

A. If I got a letter like that I would quote a price, and call attention to the fact that it must be strictly random and we had the privilege of shipping when we had anything in those sizes.

Q. Of course, Mr. Manley, you are called as a

(Testimony of J. E. Manley.)

witness for the plaintiff; I think you want to be fair. That doesn't fully answer that question.

A. I want to try and answer it. [141]

Q. We want you to answer it from your knowledge and experience as a lumberman and when a letter—and I refer now to Defendant's Exhibit 23, which is the letter of November 14, 1919—says "you can ship three to four cars or more at a time of the following, 3x6", 8", 10" and 12" 36 feet and under" and then you have a suborder which specifies, for example, fifty pieces 24 feet long, 2x6, would that be in accordance with that letter of November 14th?

A. Not that first part, but putting in that last sentence it might be.

Q. Wouldn't it be a very strange construction?

A. I would consider myself negligent if I didn't call his attention to the fact that we must be permitted to ship anything within these sizes that we might have, rather than as he is going to specify.

Q. I know, but Mr. Manley, this is approaching from the other viewpoint. We are asking you with reference to a letter which leaves the widths and lengths random, except as you say, for a final clause, which says "He will place an order for a million feet."

A. Read it there, because maybe I misunderstood that.

Q. I wish you would just read that again, and see if you will still have the same explanation. You will see it refers immediately back to the preceding portion.

(Testimony of J. E. Manley.)

Mr. GRAHAM.—And the reason I ask this question, however plain this order may be, is because it goes to the merits of this whole controversy.

A. “Our good friend Bruner here says if you want more business in number one common fir, rough, and will make a price on such stuff as the following, he will immediately place his order for same. You can ship three to four cars or more at a time of the following, 3x6”, 8”, 10” and 12” by 36 feet and under, and four by six, eight, ten and twelve, 6x6, 8x8, 10x10 and 12x12, all lengths up to forty [142] feet and under, number one, common rough delivered at Philadelphia, and could ship at your convenience and string the cars along, say three to five or ten cars at a time, if you will make him a price of \$46.00 or \$47.00 a thousand feet.—”

Q. Where is there anything up to that point—

A. That is absolutely a random order up to that point.

Q. Exactly. Now, how is there any language that modifies that order and makes it other than a random order? Where is it?

Q. “If so he will—”

Q. When it says “If so”? A. “If so”—

Q. Yes.

Q. —“he will place an order for a million feet to be made up of the various sizes above stated and in a few cars at a time.”

Q. And which refer back to the preceding lines which you have read; doesn't it? “If so”?

A. But he speaks of making up; “to be made

(Testimony of J. E. Manley.)

up of these various sizes and a few cars at a time.” There is where I would be afraid if I were handling it he would want us to ship certain lengths in one car and certain lengths in another. This is the kind of an order that is often placed, and get us into trouble.

Q. Now, Mr. Manley, isn't there a very great difference and distinction between an order for random widths and lengths and an order for specified widths and lengths? A. Yes, indeed.

Q. And isn't the market price for an order of the latter kind much greater than the price for an order to ship random widths and lengths?

A. Very much.

Q. Isn't the cost of shipping lumber to specified widths and lengths very much greater than shipping to random widths and lengths? A. Very much.

Q. Now, the market price that you quoted, or that you gave evidence [143] concerning, was that based on a shipment to random widths and lengths or specified widths and lengths?

COURT.—He gave both, I think.

A. Well, I gave both.

COURT.—Yes, one six and the other twelve.

Mr. BOYLE.—No, if the Court please; this six and twelve dollars, that meant this order was under the market price and the market had advanced, so that made a total of twelve. That wasn't as the court understands it, was it?

A. I said that that order as specified, that is having this proviso there permitting him to specify, I

(Testimony of J. E. Manley.)

would consider the price on the order as at least six dollars under the market at the time it was placed; if it didn't give him a chance to specify I would consider that approximately the market price.

COURT.—What would you consider the difference between the prices specified in that order and the market on December 19th?

A. Taking that exact order I would consider twelve dollars, because I consider that order six dollars under the market.

Q. This further question on that: If the order had been for random widths and lengths, then I understand you testify that on November 25, 1919, the price fixed in the original order was the market price? A. November 25, 1919?

Q. Yes.

A. No, I testified if that were random lengths it would be the market price, but having that proviso there specified, I considered—

Q. It six dollars underneath the market?

A. Yes, sir.

Mr. GRAHAM.—I may say, may it please the Court, that December 2d, immediately when we received this order in due course of mail, we returned it. That is preliminary to this question.

Q. What was the price of lumber of the kind and character referred [144] to in this order, the market price, on say December 7, 1919?

Mr. BOYLE.—I object as immaterial because there is nothing to show any notice was ever given

(Testimony of J. E. Manley.)

of any breach until the 19th; this is going into a field we are not prepared to meet.

Mr. GRAHAM.—The evidence will show I asked the witness Bruner immediately when this letter of December 2d returning this order was sent to Ashenfelter, if it had not been communicated to him. He said he would not say it had not. This is a question we asked on cross-examination.

Mr. BOYLE.—And the deposition further shows that the first notice he had was on the 19th, as I read it.

Mr. GRAHAM.—No, I read it very carefully, and was there when the deposition was taken.

Mr. BOYLE.—I may be mistaken.

COURT.—Go ahead.

A. Well, the price on November 19th was, we will say, \$22.00—\$23.00, and on December 19th, it was according to the business that I looked over—that we were taking at that time—it averaged about six dollars more. Now, you asked what it would be on December 7th?

Q. Yes.

A. Now, I couldn't answer that without looking at orders that we took or somebody else took at that time, but it would probably be between those costs, because the market was advancing then on account of the great scarcity of cars. Lumber was scarce in the east and you couldn't get it there, and if anything could be gotten there they were bidding for it; the sawmill men didn't make the price, it was made by the bidder,

(Testimony of J. E. Manley.)

so I would just say it probably had advanced proportionately between those dates, so that on the 7th it probably had advanced maybe two or three dollars, because that was in the time—from the middle of November [145] until approximately the 15th of February was the time the market made that rapid advance, and at that time it began to fall off.

COURT.—Did I understand you to say, Mr. Manley, that the price specified in that order was for random lengths—market price for random lengths at the date of it?

A. Yes, I would consider that the proper price for random lengths, but I consider the order for specified lengths.

COURT.—And for specified lengths it was six dollars below the market?

A. Yes, and that further proviso “to be shipped as wanted”; not only specified lengths but specified time of shipment.

Witness excused.

Testimony of J. P. Keating, for Plaintiff.

J. P. KEATING, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. BOYLE.)

Mr. Keating, where do you reside?

A. Portland, Oregon.

Q. And what is your business?

(Testimony of J. P. Keating.)

A. At the present time I am engaged in buying and selling lumber or forest products.

Q. How long have you been engaged in that business?

A. In all lines since—for the last sixteen years as well as manufacturing.

Q. Could you tell the jury what the ordinary capacity of a car of lumber known as number one common fir lumber—the capacity of a carload would be, to be shipped between here and New York, say?

A. What kind of lumber would that be, please?

Q. Number one common fir, rough lumber.

A. Number one common Douglas Fir?

Q. Douglas Fir, different lengths, 2x4, 12x12, 12 to 40 feet long. [146]

A. If that stock is sawn full size, the average would be about 21,000 feet to the carload; if sawn scant as sometimes practiced, especially if it goes on a long freight rate, and the manufacturer sells on a delivered price, it would probably carry about 24,000 feet to the car.

Q. Then you say the average would be something between these two figures?

A. Depending as I said on the condition in which the lumber is manufactured.

Q. This order that is introduced in evidence here says price delivered on a New York or eighty cent rate, \$48.50; what does that New York or eighty cent rate mean?

A. May I look at it? If you want me to interpret

(Testimony of J. P. Keating.)

it, I suppose your question means with reference to the literal writing?

COURT.—No, what does eighty cent rate mean in a writing of that kind?

A. As written, your Honor?

COURT.—Yes.

A. The rate per hundred pounds on which the freight charges are computed from Pacific Coast points and the northwest to New York City.

Q. Then that price delivered on New York or eighty cent rate, \$48.50, that would mean the price of the lumber and freight added?

A. Yes, the freight added at eighty cents per hundred on an estimate of so much per thousand feet for the kind of lumber loaded or sold.

Cross-examination.

(Questions by Mr. GRAHAM.)

How long since you have been in the lumber business? A. Sixteen years.

Q. I will call your attention to Plaintiff's Exhibits 6 and 7 and to Defendant's Exhibit 23, and ask you if the exhibits of the plaintiff, 6 and 7 are in accordance with the inquiry made in Defendant's Exhibit 23?

Mr. BOYLE.—That is objected to. [147]

COURT.—I think the objection is well taken.

Mr. GRAHAM.—I will ask to make this witness my own witness to save time.

COURT.—Very well.

A. Is it all right, your Honor?

COURT.—Yes.

(Testimony of J. P. Keating.)

A. I think this was clear.

Mr. GRAHAM.—It will save time.

Mr. BOYLE.—That is not reference to the letter of inquiry.

Mr. GRAHAM.—This in reference, Mr. Boyle, to the letter from Ashenfelter to the defendant company.

Mr. BOYLE.—We make the same objection.

COURT.—I understand your objection. You say you are not bound by the correspondence between the agent and the principal unless it came to your knowledge.

A. Answering your question, comparison of the contents of Exhibit 23, letter dated November 14th, in my opinion varies from the contents as to the commodity sold in exhibits 6 and 7, as I say, the sizes mentioned in the exhibit 6 and exhibit 7 that are not mentioned in exhibit 23—two inches thick—namely two inches thick, while exhibit 23 specified a minimum thickness of three inches; also if I am to consider Exhibit 7 a supplemental order to Exhibit 6—

Q. You are to so consider it.

A. —which is presumed to be confirmatory of Exhibit 23, I would say that Exhibit 7 is at further variance in that I observe that it carries several items specified as to thickness and width and length, which are not the regular group of lengths as we know them in the industry.

Q. Now, Mr. Keating, will you say generally whether or not the inquiry of November 14th, which

(Testimony of J. P. Keating.)

is in evidence as Defendant's Exhibit No. 23 is not an inquiry for random widths and lengths? [148]

A. It is an inquiry, Exhibit No. 23, for random thicknesses, widths and lengths.

Q. And now will you say whether Plaintiff's Exhibits 6 and 7 are or are not for specified widths and lengths?

A. Plaintiff's Exhibit No. 6 in as far as the item of sizes is concerned covers specified thicknesses, widths and lengths but the stipulation is added—I mean random—but the specification is added that it is to be shipped in sizes and lengths as wanted, which would in my opinion change it from the character of a random to a specified order.

Q. Now, what about Plaintiff's Exhibit 7?

A. Exhibit 7 I have no hesitation in saying is a specified order.

Witness excused.

Plaintiff rests.

Testimony of H. B. Van Dusen, for Defendant.

H. B. VAN DUSEN, a witness called by the defense, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. GRAHAM.)

Mr. Van Dusen, what is your business?

A. Lumberman.

Q. For how many years have you been engaged in such business? A. A little over twenty years.

Q. Are you connected at this time with any lumber company?

(Testimony of H. B. Van Dusen.)

A. Yes, the Inman-Paulsen Lumber Company.

Q. In what capacity? A. Manager.

Q. As manager of this company, do you sell a great deal of lumber? A. Yes.

Q. I will call your attention to Defendant's Exhibit 23 and Plaintiff's Exhibits 6 and 7 and will ask you if the alleged orders evidenced [149] by plaintiff's exhibits 6 and 7 are in accordance with the inquiry evidenced by Defendant's Exhibit 23?

Mr. BOYLE.—Subject to the same objection.

A. No, they are not the same.

Q. Will you explain to the Court wherein they differ? A. What exhibit is this?

Q. The letter is Defendant's Exhibit 23.

A. Twenty-three, which appears to be confirmed by Exhibit No. 6, calls for so many cars of sizes from 2x4 to 12x12, with lengths from 12 to 40; Exhibit 7 calls for specified sizes and specified lengths.

Q. Mr. Van Dusen is there any difference between the value of lumber to be shipped random widths and lengths and the value of lumber—market value of lumber to be shipped to specified widths and lengths? A. There is.

Q. There is a distinction and difference that is well recognized in the lumber industry? A. Yes.

No cross-examination.

Witness excused. [150]

Mr. GRAHAM.—We have other witnesses to the same point but I don't believe they are necessary. The plaintiff's own witnesses support that.

It has been stipulated, as I take it, between coun-

sel, but in the absence of the court reporter, that the counterclaim of the defendant is admitted.

COURT.—That is \$600.00.

Mr. GRAHAM.—We therefore rest and move the Court for a directed verdict in favor of the defendant against the plaintiff, and for a verdict on our counterclaim.

Mr. BOYLE.—From the depositions, if the Court please, it seems that the exhibits are referred to by number and not attached to the depositions. These are all exhibits.

Mr. GRAHAM.—Defense rests. There is a point which I do think it might be well to discuss at this time. I would like to have an opportunity to call the court's attention to this order and features of it in connection with the opening statement which I made.

This exhibit No. 6, may it please the Court, which is set out *in haec verba* in complainant's complaint is directed to W. C. Ashenfelter; that relates to the question of this agency; these are matters that will have to come up in depositions; with reference to this I will not take time on these points except, except I think the facts are clearly with defendant. That is all and we rest.

I, Mary E. Bell, hereby certify that I acted as Official Reporter in the foregoing court and cause, and took down in shorthand all the proceedings therein; that the foregoing is a full, true and correct transcript thereof and of all evidence introduced orally.

MARY E. BELL. [151]

Subscribed and sworn to before me this 2d day of June, 1923.

[Seal]

G. H. MARSH,

Clerk, United States District Court, District of Oregon.

By F. L. Buck,
Chief Deputy.

Filed June 2, 1923. G. H. Marsh, Clerk. [152]

AND AFTERWARDS, to wit, on the 28th day of June, 1923, there was duly filed in said court, a praecipe for transcript in words and figures as follows, to wit: [153]

In the District Court of the United States for the District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation, Now Known as ALLEN MURPHY COMPANY, a Corporation,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the above Court:

Please prepare and certify for the record on writ of error by the plaintiff herein to the Circuit Court of Appeals of the United States, for the Ninth Circuit, copies of the following:

1. The judgment-roll, entire, including the complaint, the answer, the reply; the findings of fact and conclusions and the judgment.

2. The certificate of Judge Robert S. Bean with testimony attached, certifying the correctness of the said testimony, and its use at the trial.

3. The papers filed and used to procure this writ of error, to wit:

a. Petition in error with proof of service.

b. Order allowing writ of error and fixing bond with proof of service.

c. The bond with proof of service. [154]

d. The assignments of error, with proof of service.

e. Citation in error, with proof of service.

f. Order allowing writ of error, with proof of service.

4. This praecipe with proof of service.

Dated June 28th, 1923.

PLATT & PLATT, MONTGOMERY & FALES,
Attorneys for Plaintiff.

Service of the within praecipe for transcript of record by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, June 28, 1923.

WM. S. NASH,
Of Attorneys for Defendant.

Filed June 28, 1923. G. H. Marsh, Clerk. [155]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing pages, numbered from 6 to 155, inclusive, constitute the transcript of record upon said writ of error in the case in said Court in which Owen M. Bruner Company, a corporation, is plaintiff and plaintiff in error, and O. R. Menefee Lumber Co., a corporation, now known as Allen Murphy Co., a corporation, is defendant and defendant in error; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said plaintiff in error, and it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the said transcript is \$42.45, and that the same has been paid by said plaintiff in error.

I return, with the said transcript of record attached thereto, the original writ of error and the original citation filed in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 24th day of July, 1923.

[Seal]

G. H. MARSH,
Clerk. [156]

[Endorsed]: No. 4062. United States Circuit Court of Appeals for the Ninth Circuit. Owen M. Bruner Company, a Corporation, Plaintiff in Error, vs. O. R. Menefee Lumber Company, a Corporation, Now Known as Allen-Murphy Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed July 26, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the
District of Oregon.

No. L-8874.

OWEN M. BRUNER COMPANY

vs.

O. R. MENEFEE LUMBER CO., Now Known as
ALLEN-MURPHY CO.

**Order Extending Time to and Including July 31,
1923, to File Record and Docket Cause.**

June 29, 1923.

Now, at this day, for good cause shown, IT IS
ORDERED that the time for filing the transcript
of record in this cause and docketing the same in
the United States Circuit Court of Appeals for the
Ninth Circuit, be, and the same is hereby, extended
to and including July 31, 1923.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. 4062. United States Circuit
Court of Appeals for the Ninth Circuit. Filed
Jul. 26, 1923. F. D. Monckton, Clerk.

